(1)

Supreme Court, U.S.
FILED

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NO.

IN
THE SUPREME COURT OF THE UNITED STATES

October Term 2000.

ERLING R. KROSBY
Petitioner

v.

HARRELL Z. BROWNING, THE CONTINENTAL INSURANCE COMPANY, KLEBERG & HEAD, SHELBY A. JORDAN, MATTHEW A. ROSENSTEIN.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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2 copies

QUESTIONS PRESENTED.

1. Whether it is contrary to Federal Rules of Civil Procedure and this Court's decisions when the bankruptcy court entered a summary judgment before major discoveries have been performed and whether such cut-off of discoveries is abuse of discretion and shows bias against plaintiffs in the instant case.

2. Whether the bankruptcy court with approval of the district court has not followed Rule 56 of Fed. R. of Civ. Procedure, have abused their discretion and/or showed bias when they entered a summary judgment in spite of the fact that the real estate included in the assets of the bankruptcy estate were sold at a private sale, without professional appraisals, without court approval and through a friend of the owner of debtor for $ 1 million less than the market price stated in the Disclosure Statement and the real purchasers identity was unknown because the sale was to a Louisiana Trust Company whose beneficiaries are cloaked in secrecy..

3. Whether the courts below abused their discretion when they denied Plaintiffs' motion pursuant to 18 U.S.C 3057

when the sale of the real estate did not identify who the beneficiaries of such trust were and therefore, who the real purchasers are , and it is therefore uncertain whether the real purchaser is the trustee and therefore a violation of 18 U.S.C. 154.

4. Whether it is abuse of discretion when a request for an investigation as mentioned in 18 U.S.C 3054 is not granted when $ 1 million could have been distributed to several persons through transfer of beneficiary rights in the Trust Company of Louisiana or sold at a low price by such company to different people who participated in an alleged fraudulent bankruptcy scheme.

5.. Whether a trustee has general derived judicial immunity for his tortuous acts and in addition, whether the trustee can have derivative judicial immunity when he pursuant to the Liquidating Trust Agreement was a contract trustee and therefore, had a contractual liability and had sole discretion regarding the sale and the administration of the bankruptcy estate.

6.. Whether an approval of the sales of the vessel by the bankruptcy court can also be regarded as approval of lack of proper maintenance on the part of the trustee, when the

issue of maintenance never was raised before the bankruptcy court.

7. Whether it is perjury when the trustee falsely states in an Affidavit supporting his motion for a summary judgment that he had approval of all sales made in the administration of the estate and the administration of the assets included real estate when the sales of the real estate were not approved by the bankruptcy court.

8. Whether it is a failure to exercise authority and in conflict with the laws on summary judgment when the courts below ignored Plaintiffs' motion for summary judgment , which raised many genuine issues of material fact .

9. Whether there is a requirement for obtaining a summary judgment that there are no genuine issues of material fact or whether, as decided by the lower courts, the defending parties (plaintiffs) must prove their case on the merits.

10. Whether it is necessary with leave of the Bankruptcy Court to file an action against the trustee and file a proceeding on a trustee fidelity bond when this is not required pursuant to Bankruptcy Code 322 and Bankruptcy

Rules 2010.

11. Whether a bankruptcy trustee fidelity bond is an insurance contract and if so, whether the bankruptcy court's dismissal of the instant case based on the opinion that it is not, is wrong.

12. Whether Respondent Kleberg & Head has a responsibility towards the creditors when it pursuant to the Liquidating Trust Agreement which was binding upon the creditors, was the only one who could terminate the trustee.

13. Whether a judge can revoke an admission Pro Hac Vice of an attorney of record with the clear intention of preventing a party from appealing the judgment of the judge.

14. Whether a judge who in open court and on the record seeks advice from one party how to prevent the adverse party from appealing the judgment of the judge shows that the judge's impartiality can reasonably be questioned and that her judgment therefore is void.

15. Whether a lower court's intentional prevention of an appeal of its judgment regarding a Norwegian company is interference with the higher courts' jurisdiction and a violation of a treaty between Norway and the United States

because it has the consequence of preventing a Norwegian citizen from access to the courts of the United States..

16. Whether a party whose counsel seeks to prevent an appeal by advising the court to revoke the admission Pro Hac Vice of the attorney of the adverse party, has committed obstruction of justice.

17. Whether an attorney whose admission Pro Hac Vice has been revoked can appear Pro Se and timely appeal not only the order of revocation, but also the disciplinary orders against him.

18. Whether an attorney whose admission Pro Hac Vice has been revoked in the district court, but still is admitted to the court of appeals, can appear as an attorney for his client for the purpose of appealing to the court of appeals based on his admission to the bar of the court of appeals and, whether he after the appeal has been submitted, can be an attorney of record regarding the appeal for his client.

19. Whether a district judge acting as a court of appeals can order a party to appear in court because the judge wants that the counsel of the other party shall tell the appearing party what the facts in this case are in order to influence the appearing party to dismiss the instant case.

20. Whether a district court acting as appellate court can order that only one party shall appear during the proceedings at the district court and that the adverse party was exempted from appearing, and whether such order shows that the judge's impartiality can reasonably be questioned.

21. Whether a district court acting as a court of appeals can question the authority of the attorney of record to represent his client when the attorney has represented such client for two years in the bankruptcy court and the client through its president has in affidavits and letters confirmed that its attorney has such authority..

22. Whether it is an abuse of discretion when the district court refused to accept an affidavit containing a transcript of public corporate records in possession of the corporate section of the Norwegian government and the documents were translated into English by a Norwegian and confirmed by the Consulate General of Norway and still order the president of the company to travel from North-Norway and appear in court in Corpus Christi regarding this issue.

23. Whether it is abuse of discretion and evidence of bias which makes the district court's judgment void, when the

district court requires only Tor Husjord Shipping's president to appear in court in order to explain the name change of the company, when the liability of the adverse party's insurance company pursuant to the fidelity bond was transferred to a different corporate entity and the request that president of the transferee insurance company also shall appear, was denied.

THE PARTIES TO THE PROCEEDINGS

All the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case.

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HARRELL Z. BROWNING, THE CONTINENTAL INSURANCE COMPANY, KLEBERG & HEAD, SHELBY A. JORDAN, MATTHEW A. ROSENSTEIN.
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On Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit.

PETITION FOR WRIT OF CERTIORARI

Erling R. Krosby petitions for a writ of certiorari to review the United States Court of Appeals for the Fifth Circuit's order of dismissal of the appeal regarding the District Court's grant of Respondents motions for summary judgment. Erling R. Krosby appears personally pursuant to 29 U.S.C. 654. Tor Husjord Shipping has been a party to this proceeding from its commencement. However, its

counsel's, Erling R. Krosby, application to be admitted to the Bar of this Court has been denied because Respondent Harrell Z. Browning has filed an unlawful complaint against him with the Pennsylvania Disciplinary Counsel. Therefore, Tor Husjord Shipping has not been able to find another attorney on short notice. This Court is requested to reverse the summary judgment of the courts below in its entirety or decide that such judgments are void, because the judgement against Petitioner Erling R. Krosby is partly based on the incorrect determination by the District Court that Mr. Krosby's has filed a frivolous lawsuit. . Therefore, Tor Husjord Shipping and obviously the creditors of Burton Securities, which are beneficiaries of the trustee fidelity bond, support this Petition because a reversal would be favorable to all the creditors.

OPINIONS AND ORDERS BELOW.

The order of the court of appeal is unreported.

(1) Order of the United States Court of Appeals for the Fifth Circuit, entered on October 6, 2000 (App page 1-3) and petition for rehearing denied on December 29, 2000. (App page 4-5)

(ii) Findings of Facts and Conclusions of Law of the United States District Court for the Southern District of Texas, Corpus Christi Division on May 1, 2000. (App. page 6-68.)

(iii) Memorandum Opinion and Order Granting Amended Motion for Summary Judgment by Harrell Z. Browning entered on March 19, 1999 by United States Bankruptcy Court for the Southern District of Texas,, Corpus Christi Division . (App. page 69-99)

(iv) Memorandum Opinion and Order Granting Defendant Kleberg & Head , P.C's motion for Partial Summary Judgment entered by United States Bankruptcy Court for the Southern District of Texas on March 19, 1999 . App. page 100-115)

(v) Order Granting Continental Insurance Company's Rule 7012(B) to Dismiss Complaint. entered by United States Bankruptcy Court for the Southern District of Texas on Match 19, 1999. (App. page 116-122)

JURISDICTION

An Order for the United States Court of Appeals for the Fifth Circuit was entered on October 6, 2000 (App.

page 1-3) and a timely petition for rehearing was denied on December 29, 2000. (App. page 4-5) This Court's jurisdiction rests on 29 U.S.C. 1254 (1). The United States Court of Appeals for the Fifth Circuit rests on 29 U.S.C. 291.

STATUTES , TREATIES AND RULES INVOLVED.

(i) Rule 455 (a) of Federal Rules of Civil Procedure (FRCP). App. page . (ii) The Treaty between the United States and Norway "Friendship, Commerce, and Consular Rights , signed at Washington , June 5, 1928 and February 26, 1929 , Article I. App. page 77-74. (iii) Rule 11 of Fed. R. of Civ. Proc. App. page (iv). Rule 17 of Fed. R. of Civ. Proc. App. page .(v) Rule 56 of Fed. R. of Civ. Proc. App. page . (vi) Bankruptcy Rule 2010, (b). App. page . (vii) Bankruptcy Rule 322 (d). App. page . (viii) 18 U.S.C. 3057 App. page . (ix) 18 U.S.C 154 . App. page .

STATEMENT OF THE CASE.

1. Petitioner, Tor Husjord Shipping, filed in August 1989 a Complaint in the United States District Court for the Southern District of Texas, Brownsville

Division in order to establish and enforce its maritime and attachment lien in the vessel Le Mistral, which was owned by Burton Securities.

Burton Securities filed in August 1991 a voluntary Chapter 11 proceedings and the case was moved to the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division.

A Creditor Plan of Reorganization was approved on November 30, 1992 for liquidation of the assets of the bankruptcy estate.

Appellee Browning was through a motion submitted by the creditors recommended as Liquidating Trustee and this motion was approved by the Bankruptcy Court.

A letter sent by Kleberg & Head upon request of the Bankruptcy Court states an addition to the Creditor Plan, that *"The plan contemplates that the operations will immediately terminate, personnel except for a watchman will be terminated , insurance reduced to portrisk, and the vessel appraised and sold as soon possible."* Respondent/Trustee/ Harrell Z. Browning breached that

duty by not terminating the captain and the chief engineer on a non-sailing vessel, but contrary to the interest of the creditors, paid salaries to such employees of Debtor of approximately $ 70,000 per year.

Further, the Trust Agreement provides as follows: *The purpose of this Agreement and the appointment of the liquidating Trustee is to collect , protect , liquidate and distribute the Trust Property."* (Emphasis added).

Respondent/Trustee Browning breached his duty to protect the vessel by using the money to salaries to pay Debtor's captain and chief engineer instead of using such money to provide for full lay-up procedure that would have prevented that the value of the vessel was reduced from approximately $ 1.3 million to $ 325.000,. which was the final sale price as stated in Bankruptcy Court Memorandum and Order, App. page

In the Findings of Fact and Conclusion of Law entered by the District Court it is stated (App. page 6,) that the creditors did not object to the sales and therefore the sales were binding upon the creditors. This is not correct. The purchase price of the vessel was correct each time

Respondent Browning received approval of the sale and therefore, the creditors could not object. However, because Respondent Browning did not maintain the vessel, it deteriorated in value, and the market price deteriorated correspondingly. However, the price for the final sale of the vessel was correct, but as scrap value. The Complaint does not complain about the correctness of the sales price that was approved by the court, but Respondent'/Trustee's failure to sell the vessel quickly and the devastation of the value of the vessel by failure to maintain it. The District Court's statement that Respondent/ Trustee had approval of the court of every action he took, miss the point because he had no approval of lack of maintenance of the vessel.

Due to Respondent/ Trustee's failure to sell the vessel quickly and failure to maintain the vessel, Petitioner Tor Husjord Shipping asked for Respondent Browning's resignation. This was denied by Respondent Kleberg & Head who was the only one who was entitled to perform that act pursuant to the following provision in the Trust Agreement.: *" The Liquidating Trustee may be*

removed or replaced by Kleberg & Head,. P.C. with or without cause , at any time."

Further, the Trust Agreement provides as follows: *"All sales of Trust Property shall be conducted in the Liquidating Trustee's sole discretion and the trust property shall not be charged and the Liquidating Trustee shall not be liable for the exercise of this discretion unless it has been found guilty of willful misconduct , bad faith , or gross negligence shown by clear and convincing evidence."* Therefore, the creditors could only sue the trustee for bad faith and gross negligence when the administration of the estate was finished and final evidence of such misconduct could be provided.

In addition, Liquidating Trust Agreement provides as follows: *"This is a liquidating trust and the Liquidating Trustee shall be a contract Liquidating Trustee and not a fiduciary."* (Emphasis added.).

Because the Liquidating Trustee is a contract Liquidating Trustee, he cannot, as maintained by him and approved by the courts below, have derivative judicial immunity unless he obtains specific approval of his actions

of the bankruptcy court. When the Trust Agreement states that the Trustee is not a fiduciary it is contrary to agency law. However, the bankruptcy court entered an Order that amended the Creditor Plan so that the Trustee must provide a trustee fidelity bond pursuant to the Bankruptcy Code. By such a bond the Trustee became a fiduciary because a condition of the trustee bond is faithful performance by the Trustee. App. page 123-124.

The complaint against Respondent Browning includes also his misrepresentation and failure to abide by the requirements of the court that he should provide evidence that the purchaser had the necessary resources in the bank and could afford to pay the purchase price. If he misrepresents such facts to the court he does not have any derived immunity when the court approves the sale. This rule of law is stated in this Court's decision in *Mosser v. Darrow*, 241 U.S. 126.

Respondent Browning sold the vessel and the real estate first to Siena, then only the vessel to Big Bear Cruise Lines , and then to Europa Cruise Lines. All such sales were not consummated because the purchasers did not have

any available funds to purchase. These issues were raised in "Motion to Bring in Additional Plaintiffs and Defendants, for Joinder of Proceedings on the Trustee's bond and to Amend Complaint to Conform to Evidence." App. page 152-158 . It is therefore, incorrect when the courts below state that Petitioner Tor Husjord Shipping did not file a motion to amend the complaint. This also proves that there are several genuine issues of material fact which prevent that a summary judgment be entered..

The Disclosure Statement listed the net assets to be of a value of approximately $ 4 million. (App. page 225, Bankruptcy Rec. on Appeal # 17) After 2 1/2 years of administration and sale of the assets Respondent/Trustee Browning submitted on June 2, 1995 an accounting regarding the sale of the assets, which showed a net of approximately $300,000. This devastation of estate values is contrary to the interest of the creditors and therefore, Respondent Browning is pursuant to *Mosser v. Darrow,* supra , liable for damages.

Respondent Browning sold the real estate which was listed in the Disclosure Statement of a value of

approximately $ 1,980,000, for only $798,489. He sold one piece of commercial property for $ 239, 145 without court approval and notice to the creditors, which price was half of that property's real value. Such low sales price was previously denied by the bankruptcy court. He sold five pieces of commercial real estate of a value listed in the Disclosure Statement of Creditors of $ 1,555,000 for $ 559,250 without court approval and notice to the creditors, through Johnny Johnson, a friend of the owner of Debtor , George Camatsos , to a Louisiana Trust Company , whose beneficiaries and therefore the real owners are cloaked in secrecy. Such sale caused a loss to the estate of approximately $ 1 million.

Mr. Camatsos has been convicted of Tax Fraud of approximately $ 4 million and sentenced to one year in prison and lost his medical license due to fraudulent violation of his professional responsibility.

As shown in Respondent Browning's Description of Services (App. page 126-130) he almost immediately contacted Mr. Camatsos and Mr. Camtsos' friend Johnny Johnson regarding the sale of the assets. Respondent

Browning violated normal procedure by not obtaining appraisals of the value of the real estate by professional appraisers, but relied only on Debtor and his friend Johnny Johnson in that respect. This is a conduct contrary to the interest of the creditors. The Executive Office of the United States Trustee in Washington has been told that Johnny Johnson was the sole beneficiary of The Trust Company of Louisiana and if so the sale of the real estate may be determined to be bankruptcy fraud.

2. Respondent Browning has been requested by the creditors to approve that they review his files. This has been denied with reference to an order of the bankruptcy court that no major discoveries shall be performed until it had decided Respondent Browning's motion for summary judgment. The creditors, Tor Husjord Shipping and Marcus Byrd, requested pursuant to 18 U.S.C. 3057 that the bankruptcy court and the district court requested the United States Attorney to investigate who were the beneficiaries of The Trust Company of Louisiana, and therefore who were the real purchasers of the real estate. Such motions have been denied by the

courts below with the argument that the courts decided that there are no reasonable grounds for believing that Respondent Browning has committed any criminal offense.

However, pursuant to 18 U.S.C. 3057 it is not necessary that the issue involved is a criminal offense. The Article states that "Any judge .....having reasonable grounds for believing that any violation under.....laws of the United States .....has been committed **or** (emphasis added) an investigation should be had in connection therewith , shall report to the appropriate United States Attorney ....."

When Respondent Browning refused at the Pretrial Conference and later to provide the information regarding the Trust Company of Louisiana it is a violation of the laws of the United states and an investigation of that issue should be performed by United States Attorney. Further, it is not within the authority of the honorable judges below to decide whether a criminal offense has been committed. Because of the fact that the beneficiaries of the purchaser, the Trust Company of Louisiana, are cloaked in secrecy it is possible that the real purchaser is Respondent/Trustee

Browning. This would be a criminal offense and a violation of 18 U.S.C. 154 because a trustee cannot directly or indirectly purchase assets of the estate. When there is uncertainty about this issue and who the real purchases are, the bankruptcy court and the district court have abused the discretion they have pursuant to 18 U.S.C 3057 when they have denied the request for investigation. . Also the United States Court of Appeals for the Fifth Circuit has abused its discretion when it denied Tor Husjord Shipping's motion to investigate pursuant to 18 U.S.C. 3057. See App. Page 166-167.

The failure of the courts below to act pursuant to 18 U.S.C. 3057 is also in conflict with Rule 56 Fed. R. of Civ. Proc. because the sale of the real estate raises genuine issues of material facts. No summary judgment in this case can be approved as long as nobody knows who is the beneficiary of the Trust Company of Louisiana and therefore, the real purchasers of such property.

3. In 1993 Respondent Browning sold the whole estate to Siena for net $ 1.8 million. Leisure Time offered a $ 300,000 higher price during a hearing in the

bankruptcy court on that sale. Respondent Browning fraudulently misrepresented to the bankruptcy court that a sale to Leisure Time would cause delays with the consequence that the vessel was sold to Siena. This company disappeared just before the closing and the estate lost $ 1.7 million. After this failure Petitioner Tor Husjord Shipping requested Kleberg & Head to terminate Respondent Browning. It refused to do so, which is the basis for the claim against Respondent Kleberg & Head.

This issue was among the several issues that were the ground for Petitioner Tor Husjord Shipping's Motion for Summary Judgment, which was ignored by the courts below which is failure to exercise authority pursuant to Rule 56 (c) of Fed. R. of Civ.. Proc.. This Motion for Summary Judgment raises several genuine issues of major fact and Respondent Borrowing's Motion for Summary Judgment should not have been granted by the courts below.

4. Kleberg & Head was the only one who pursuant to the Creditor Plan had authority to terminate the Trustee, which made Respondent Klebeg & Head a representative of

the creditors and established a liability for alleged conspiracy with Respondent Browning. It is fraud upon the creditors when Kleberg & Head, which wrote the Trust Agreement , alleges that it has no duty to the creditors , when it upon request of the creditors, placed itself as the sole creditor who could terminate the trustee, and it did so only for its own benefit...

5. Because estate values of approximately $ 4 million were reduced to approximately net $ 300.000 a lawsuit was filed by Petitioner Tor Husjord Shipping with a claim of approximately $1 Million and the creditor, Marcus Byrd, with a claim of $ 3 million against Respondent Browning and Kleberg & Head. Respondent Browning concealed the fact that he had purchased, as required by the bankruptcy court, a trustee fidelity bond with United States as the beneficiary and with Respondent Continental Insurance Company as insurance carrier. The existence of the bond was later discovered by Tor Husjord Shipping.. Respondent Continental charged a premium of $ 1,600 per year but issued a bond only in the amount of $ 160,000, when the correct amount of the bond pursuant to Texas

Department of Insurance was $ 1,260,000. This is a violation of Texas Insurance Code. Technically it is also fraud upon the beneficiary of the bond, namely the United States. It is also a violation of law when the trustee bond was not submitted for approval of the United States Trustee and the filing of such trustee bond was not sent to the major creditors.

6. Respondent Browning filed immediately after the creditors' complaint a Motion to Dismiss and soon thereafter a Motion for Summary Judgment. In an Affidavit filed in support of his Summary Judgment Respondent Browning falsely stated that he had the approval of the bankruptcy court of all his sales regarding his administration of the estate. (App page 170) Respondent Browning now states that his statement included only the vessel. This is not a possible interpretation of his statement because " *each sale of mine in the administration of this estate"* means all the assets of the estate and the administration of assets includes the real estate. Because of this perjury the bankruptcy court decided that Respondent Browning had approval of all the

sales and therefore derivative immunity and entered summary judgments in favor of Respondents. App. page 87. Respondent Browning was requested during one of the hearings at the bankruptcy court to tell the court under oath which order that approved the sale of the real estate. He never responded to that request and the attorneys of defendants did not come forward and told the court that such sales were never approved by the bankruptcy court. This failure to correct a perjury is contempt of court and Petitioner Husjord filed a motion for adjudication for civil contempt of court also against the attorneys. . The contempt proceedings initiated by Petitioner Husjord are therefore not frivolous.

7. Contrary to accepted rules of law, the bankruptcy court entered an order that stopped all major discoveries. (App. page 131-132). This order is in conflict with Rule 56 of Fed. R. of Civ. Proc. item (c) which assumes that depositions, interrogatories and admissions have been performed. The orders of the courts below are also in conflict with this Court's decision in *Celotex Corp v. Catrett,* 477 U.S. 317 in which it stated as

follows:

"The plain language of rule 56(c) mandates the entry of summary judgment after adequate time for discovery."

8. As stated by the District Court (App. page 11) Petitioner Tor Husjord Shipping amended the Complaint without leave of court. This is an incorrect statement of fact. As mentioned above Petitioner Husjord filed a "Motion to Bring in additional Plaintiffs and Defendant, for Joinder of Proceedings on Trustee's Bond and to Amend Complaint to conform to Evidence". App. page 152-158. This Motion was never considered and decided by the bankruptcy court in conflict with Rule 15(b) of Fed. R. of Civ. Proc. However, the issues raised in that Motion were all the time argued during hearings without objections and must be regarded approved as an oral motion by the bankruptcy court.

The District Court states in its judgment that no leave of court was obtained regarding the Second Amendment of the Complaint. The second amendment is a proceeding on the trustee's bond pursuant to Bankruptcy

Rules 2010. This provision requires no leave of court to be filed and the bankruptcy court and the district court are making their own rules without basis in statutes, rules or caselaw.

The Third Amended Complaint was filed in connection with a Motion to Withdraw Reference filed with the United States District Court , Brownsville Division pursuant to 28 U.S.C. 157(d), because resolution of the proceeding requires consideration of both title 11 and other laws of the United States. The Motion to Withdraw Reference is in itself a motion for leave of court to amend the complaint to include for example civil Rico claims.. Therefore, the courts below are wrong when they state that Petitioner Husjord has not followed the rules of law in this respect.

9. In spite of the fact that genuine issues of material facts were present in this case the bankruptcy court entered in conflict with Rule 56 of Federal Rules of Civil Procedure the following Orders :

(1) Memorandum Opinion and Order Granting Amended Motion for Summary Judgment by Defendant

Harrell Z. Browning. (2) Memorandum Opinion and Order Granting Defendant Kleberg & Head, P.C.'s Motion for Partial Summary Judgment. (3) Order Granting Continental Insurance Company's Rule 7012(B) Motion to Dismiss Complaint.

10. The Summary Judgments and Orders of the Bankruptcy Court were appealed to United States District Court , Corpus Christi Division.

During the hearings at the District Court as court of appeals, Honorable District Judge engaged in conduct prejudicial to the administration of justice, see 28 U.S.C. 372(c)(1).

11. As can be seen from the Transcripts of the hearing on February 4, 2000 at the United States District Court, the Honorable District Judge sought advice from Respondent Browning's attorney how to prevent Erling R. Krosby as counsel for Tor Husjord Shipping from appealing an unfavorable judgment entered by the District Court. (App page 101-105). This is contrary to Fed. R. of Civ. Proc. and due process of law and is interference with the higher courts' jurisdiction. Whether an appeal to the

court of appeals is frivolous must be decided by the court of appeal and not by the district court. Further, this shows that Honorable District Judge's impartiality can reasonably be questioned and the Honorable Judge should have recused herself pursuant to 28 U.S.C. 455 (a) and (b)(1). Therefore, the Honorable Judge Jack's judgment is void.

Such intentional prevention of an appeal of its judgment regarding a Norwegian company is interference with the higher court's jurisdiction and a violation of the treaty "Friendship, Commerce and Consular Rights" between Norway and the United States because it has the consequence of preventing a Norwegian citizen from access to the courts of the United States. App. page 168-169.

12. The District Court's statement on App. page 7 that Tor Husjord Shipping never appeared in court is incorrect. Tor Husjord testified during the trial at the Bankrtupcuy Court and has filed several Affidavit's as evidence in this case.

13. It is abuse of discretion when the District

Court requested that Petitioner Erling R. Krosby shall show authority to represent his client, when he has been Petitioner's attorney since the commencement of this lawsuit and appeared also as witness during the trial at the bankruptcy court. Erling R. Krosby also argued Tor Husjord Shipping's case regarding its maritime lien before the United States Court of Appeals for the Fifth. Circuit. Further, Tor Husjord Shipping confirmed in an Affidavit dated March 9th. 2000 that Erling R. Krosby was attorney for Tor Husjord Shipping since 1990 . App. Page 149-151. It is abuse of discretion when the district court required Tor Husjord to testify at a hearing when the same can be achieved through an Affidavit.

14. The hearing at the District Court on January 26, 2000 was scheduled long time in advance. Only a few days prior to that date the District Court ordered Tor Husjord to be present, when it was impossible for him to travel from North Norway to Corpus Christi and arrive in time for the hearing. At the hearing on February 1, 2000 Tor Husjord was represented by one its top employees, Asbjorn Hermansen. The District Court did not accept this

representation and required Tor Husjord to be present at the hearing on February 4, 2000. Tor Husjord had then a valid certificate from his physician that he was ill. Regarding the hearing on March 6, 2000 Tor Husjord could not attend because on that day a hearing in which many international lawyers were present for deciding $ 60 million maritime accident claims. Tor Husjord Shipping filed each time a motion for continuance.

15. To require Tor Husjord to travel from North Norway to Corpus Christi in order to testify regarding who the right party in interest is, seems to be abuse of discretion when Tor Husjord in his Affidavit filed a translation of Minutes of the Tor Husjord Shipping confirmed by the Norwegian Consulate General by which the name was changed to Tempo A/S. App. page 143-148.

16. The District court is also wrong when it states that Petitioner Mr. Krosby committed misrepresentation in his Pro Hac Vice Motion. This motion was only based on the fact that he was admitted to the Bar of the United States Court of Appeals for the Eastern District of Pennsylvania, which is correct.

Erling R. Krosby, whose admission Pro Hac Vice was revoked by the district court, but still was admitted to the court of appeals, can appear as an attorney for his client for the purpose of appealing to the court of appeals based on his admission to the bar of that court of appeals. An approval of Respondents' request for dismissal of the appeal based on pure technicalities and based on an improper revocation of Erling R. Krosby's admission Pro Hac Vice is contrary to justice and is abuse of discretion.

The District Court entered a judgment on May 1, 2000 with Findings of Fact and Conclusions of Law and Final Judgment in favor of Appellees/Respondents. App page . Notice of Appeal to the United States Court of Appeals for the Fifth Circuit by Erling R. Krosby was entered on the docket on May 24, 2000 , (App page 140-141) and Tor Husjord Shipping's Notice of Appeal was entered on the docket on May 31, 2000. (App. page 142-144)

REASONS FOR GRANTING THE PETITION.

In the instant case a bankruptcy trustee has devastated almost completely a bankruptcy estate of a value in excess

of $ 4 million. If the orders and judgments of the courts below are not reversed and the trustee can freely devastate $ 4 million of bankruptcy estate, it would open up for bankruptcy trustees in the United States freely to devastate billions of dollars of the creditors. money. Because the judgment of the courts below would be contrary to public policy it calls for exercise of this Court's supervisory power.

A.

The Judgment of the District Court Conflicts with this Court and other Courts of Appeals that have addressed these issues

The Judgment of the District Court conflicts with the rule of law stated in the following judgments :

1. The judgment of the District Court is in conflict with this Court's decision in *Mosser v. Darrow,* 24 U.S. 267 (1951) which states the rule of law regarding a trustee's responsibility. This Court stated as follows:

" Equity tolerates in bankruptcy trustees no interest adverse to the trust . This is not because such interests are always corruptive, but because they are always

corrupting".

The facts stated above show clearly that Respondent Browning acted contrary to the interest of the creditors. In spite of this the United States Courts of Appeals have interpreted this judgment in different ways. Therefore, this Court should emphasize even more the implication of the rule of law stated in *Mosser* , supra , in the context of the instant case.

2. The District Court' judgment is in conflict with this Court's judgment in *Celotex Corp. v. Carrett,* 477 U.S. 317 because the district Court's judgment entered a summary judgment prior to the performing of major discoveries. This Court states in *Celotex,* infra as follows:

" The plain language of Rule 56(f) mandates the entry of summary judgment after adequate time for discoveries....."

No summary judgment can be entered in this case as long as it is not revealed who the beneficiaries of the Trust Company of Louisiana are. Most probably the sole beneficiary of that company is Johnny Johnson, a friend of owner of Debtor, and the sale at a price which is $ 1 million

lower than the market price raise the issue of bankruptcy fraud.

3. The District Court states the rule of law that creditors must have approval of the bankruptcy court before filing a lawsuit against a trustee regarding a proceeding on a trustee bond. This rule is in conflict with Bankruptcy Code 322 and Bankruptcy Rule 2010 which contains no such requirement and is contrary to the only judgment that is entered on the issue, namely *Alexander v Union Surety & Guaranty Company,* 85 NYS 282.

4. The rule of law confirmed by the District Court that statute of limitations in the instant case is two years is contrary to Bankruptcy Code 322(d) which states that proceedings on a trustee bond are barred two years after the trustee's discharge. Respondent Browning has not yet been discharged as trustee. The claim in the instant case is also based on fraud and the limitation period for such action is four years. Further, the Trust Agreement states provides that the trustee is a *"contract Liquidating Trustee",* and the limitation period regarding contracts is four years.

5. The District Court's judgment states that Respondent Continental Insurance Company is a commercial surety and the bond is not an insurance contract and Continental can therefore not be sued. Such rule of law is contrary to *Southern Surety Co. v. citizens State Bank,*212 S.W. 566 and *American Casualty Company v. Texas Real Settee Com'n,*362 S.W. 2d 192 (1962) which specifically state that a fidelity bond is an insurance contract.

6. The courts below have interpreted 18 U.S.C. 3057 contrary to the intention of the Congress.

B.

The decision below have so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by lower courts, as to call for an exercise of this Court's supervisory power.

The Questions Presented above refer to facts that show that the district court has engaged in conduct prejudicial to the effective and expeditious administration of the business of the court. If the decisions of the courts below are not reversed it will have severe adverse

consequences throughout the federal judiciary system.

. In addition, Petitioner, Tor Husjord Shipping and Erling R. Krosby are Norwegian citizens and are protected by the Treaty Friendship, Commerce and Consular Services. This Treaty is federal law. The orders and judgments of the court below would deny them the freedom of access to the courts of the United States and would therefore be a violation of federal and international law. .

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Erling R. Krosby
Acting Pro Se
2243 Foreland Drive
Houston, Texas 77077,
Telephone (281) 497 2203
Fax: (28) 531 0039

APPENDIX

U.S. COURT OF APPEALS
FILED
OCT. 16 2000
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40586

In The Matter of : BURTON SECURITIES INC.
Debtor

ERLING R. KROSBY, TOR HUSJORD SHIPPING
Appellants

v.

HARRELL Z. BROWNING, THE CONTINENTAL INSURANCE COMPANY, KLEBERG & HEAD ,MATTHEW A. ROSENSTEIN.
Appellees

Appeals from the United States District Court for the Southern District of Texas, Corpus Christi.

Before SMITH, STEWART, and DENNIS, Circuit Judges.

BY THE COURT.

IT IS ORDERED that motion of Appellees Harrell Z. Browning, The Continental Insurance Company , and Matthew A. Rosenstein to dismiss appeal is GRANTED.

IT IS FURTHER ORDERED that Appellants' additional request pursuant to 18 U.S.C. 3057 that an appropriate U.S. District Attorney investigate the sales of the real estate of the Burton Securities bankruptcy estate is DENIED.

IT IS FURTHER ORDERED that the motion of Appellees Harrell Z. Browning. The Continental Insurance Company, and Matthew A. Rosenstein__ to strike Appellants. statements of issues is GRANTED.

IT IS FURTHER ORDERED that Appellees' renewed motion to dismiss appeal is GRANTED.

IT IS FURTHER ORDERED that Appellants' motion pursuant to 18 U.S.C. 3057 that appropriate U.S. Attorney investigate Appellee Browning's failure to maintain the vessel and the sale of the real estate is DENIED.

IT IS FURTHER ORDERED that Appellants' additional request or evaluation of Appellants' complaint of Honorable Judge Jack and Honorable Bankruptcy Judge Schmidt pursuant to 28 U.S.C. 372 (c)(1) is DENIED.

IT IS FUTHER ORDERED that additional request to reverse District Court's judgment is DENIED.

IT IS FUTHER ORDERED that Appellants' alternative request to remand the case is DENIED.

U.S.COURT OF APPEALS
FILED
DEC. 29,2000
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES OF APPEAL
FOR THE FIFTH CIRCUIT

No. 00-40586

IN THE MATTER OF :BURTON SECURITIES, INC
Debtor

ERLING R. KROSBY, TOR HUSJORD SHIPPING
Appellants

v.

HARRELL Z. BROWNING, THE CONTINENTAL INSURANCE COMPANY, KLEBERG & HEAD, MATTHEW A. ROSENSTEIN.
Appellees

Appeals from the United States District Court for the Southern District of Texas, Corpus Christi

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ON PETITION FOR REHEARING EN BANC
(Opnion ___, 5.Cir._____, _____ F.3d _____

Before SMITH, STEWART AND DENNIS, Circuit Judges

PER CURIAM.

(x) Treating the petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for panel Rehearing is DENIED. No member of the panel nor

judge in regular active service of the court having requested that the court be polled on Reharing En Banc (FED, R. APP. P. AND 5TH CIR. R.15), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing , the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of he members of eh court, and a majority of the judges who are in regular active service Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

_____

United States Circuit Judge

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 4 FOR STAY OF THE MANDATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

TOR HUSJORD SHIPPING A.S.,
ET AL.
Plaintiffs

VS.

HARRELL Z. BROWING, ET AL.
Defendants

FINDING OF FACT AND CONCLUSIONS OF LAW

On this day came on for consideration the above-reference Adversary Proceeding. The findings of fact and conclusions of law, as if they were a recommendation from a Magistrate Judge. The Court, having heard the evidence and arguments of counsel, makes the following further finding of fact and conclusions of law:

I. PROCEDURAL HISTORY

On August 14, 1991, Burton Securities, S. A. (The "Debtor"), filed its Chapter 11 Bankruptcy Petition. Kleberg & Head, P. C., Now know as The Kleberg Law

firm ("Kleberg") represented Burton Securities, Inc., in an admiralty action against a former charterer of the gaming/cruise ship owned by Burton Securities and operated out of Brownsville, Texas. When Burton Securities filed for reorganization under Chapter 11 of the Bankruptcy Code, Kleberg became a creditor of the Debtor for unpaid legal fees arising from its prior representation. Plaintiffs, Tor Husjord Shipping A/S, Memories, Inc., Marcus Byrd, and Majestic, Ltd. (the Plaintiffs") were also creditors of the Debtor.

The Chapter 11 Plan of Reorganization (the "Plan") was confirmed by the Bankruptcy Court on December 1, 1992. The Plan was a creditor plan, proposed by Kleberg on behalf of all creditors. The Plaintiffs were signatories to the proposed plan and co-sponsored the proposed plan. Kleberg represented only itself and Plaintiffs admit in their pleadings that all of the other creditors of Burton Securities, voted to accept the Plan.

Harrell Z. Browning ("Browning") was proposed, appointed, and duly qualified as the liquidating trusted

under the Liquidating Trust Agreement pursuant to the Plan, by order of the bankruptcy court entered December 1, 1992. Browning was appointed to perform the trustee duties set forth in the Liquidating Tr5ust Agreement (the "Trust Agreement"). Browning's duties were to liquidate the estate, not to conduct any ongoing business of the Debtor. The Trust Agreement limited Browning's liability to willful misconduct, bad faith in the administration of his Trustee's duties, or gross negligence in the administration of the Trust Agreement, which was required to be proven by clear and convincing evidence. The Trust Agreement specifically exempts Browning from liability for breach of contract for his performance or in the administration of the Trust Agreement, or for his discretionary decision or actions. Plaintiffs' claims against Browning deal only with his conduct in this capacity of trustee pursuant to the Trust Agreement.

One of the Debtor's primary assets was the gaming/cruise ship (the "vessel"). The vessel was transferred to the Liquidating Trust to be administered by

Browning in accordance with the Trust Agreement and the Plan. Browning made numerous attempts to sell or lease the Vessel. Finally, on December 20, 1994, Browning filed his Third Motion to Sell the Vessel, this time to Casco Bay Lines. The Motion was approved and the sale was ultimately consummated on May 5, 1995, for a net of $325,000.00. Plaintiffs were notified pursuant to the Bankruptcy Rules of Procedure well in advance of Browning's Motion to Sell, and were aware of the negotiated contract for sale of the Vessel. Plaintiffs never objected to the sale. Plaintiffs attended each hearing on the issue of the propriety and best interest of the estate regarding sale of the Vessel and were represented at each hearing by their attorney, Robert Woolsey, but never objected to Browning's conduct. Plaintiff's attorney, Robert Woolsey also gave legal advice and negotiation strategy to Browning, and drafted written agreements regarding the various motions to sell. The order approving the sale of the Vessel was not appealed and is a final order.

Browning obtained bankruptcy court approval of his conduct prior to each attempt to sell the Vessel. Browning hired Robert Woolsey, Plaintiff's own counsel and an admiralty law expert, as special counsel to the estate. After sale of the Vessel, Browning applied for and obtained bankruptcy court approval for his compensation. The orders approving compensation for Browning are final and non-appealable. The Plan and Trust Agreement provide that the liquidating trustee may be removed by Kleberg with or without cause at any time. Plaintiff's counsel requested Kleberg remove Browning in the early part of 1994. Kleberg refused to remove Browning and Plaintiffs took no other action to remove Browning.

On May 30, 1997, Plaintiffs filed their Complaint for damages alleged as a result of Browning's actions in selling the Vessel and Kleberg's failure to remove Browning, in the United States District Court in Brownsville. The case was referred to the bankruptcy court and venue was moved to the Corpus Christi Division by agreement. Plaintiffs sought leave to file their first

amended complaint, which was heard and taken under advisement by the bankruptcy court. Plaintiffs attempted to file two additional amended complaints, the second and third amended complaints, without leave of court. The second Amended Complaint added Continental Insurance Company ("Continental") as a defendant. From the time Plaintiffs first filed their Complain, Plaintiff Tor Husjord Shipping, A/S never appeared in court, nor for depositions. After the case was pending before the bankruptcy court for almost two years, the bankruptcy court entered Summary Judgment in favor of Defendants Browning and Kleberg, and dismissed defendant Continental.

The Plaintiffs appealed and later filed a Motion for Issuance of Writ of Mandamus, which this Court consolidated with the pending appeal. The Application for Writ of Mandamus asked the District Court in Brownsville to order the bankruptcy court to transmit Plaintiffs' Motion to Withdraw the Reference to the District Court for ruling. By Ordered entered January 12, 2000, a hearing was set on January 24, 2000, the Court entered a *Sua Sponte* Order for

Attorney to Sow Authority to Represent Client, which ordered Plaintiffs to appear at the January 26, 2000 hearing. The Plaintiffs filed a Motion for Continuance on January 25, 2000, which was stricken for lack of a statement regarding conference with opposing counsel pursuant to Local Rule 6(A)(4). At the January 26, 2000, hearing, counsel for all Defendants appeared. Despite the Court's Order to Appear, only counsel for Plaintiffs, Erling R. Krosby ("Krosby"), appeared and none of the Plaintiffs or their representatives appeared as ordered. Krosby told the Court that his client representative, Tor Husjord ("Mr. Husjord") was unable to make timely arrangements to travel from Norway to Corpus Christi on short notice. (1/26/00 tr., P.1, L..20-P.3, L.10).

Krosby requested a continuance so that Plaintiffs could be present at the rescheduled hearing. The Court issued an agreed Temporary Injunctions against the Plaintiffs, which prohibited them from filing any lawsuit against the Defendants or their counsel without permission from the Court. This was necessary as Krosby explained

that he was going to Illinois to file suit against Browning for perjury. The hearing was re-set to February 1, 2000, and all Plaintiffs and their attorneys were ordered to appear in person and to obtain a Norwegian interpreter if needed. Krosby assured the court that Mr. Husjord could appear on February 1, 2000 (1/26/00 tr., P.4, L. 4-8). Defendants Marcus Byrd, Majestic Ltd., and Memories, Inc. moved to dismiss their appeal, which was granted.

At the February 1, 2000, hearing, Krosby appeared and Mr. Asborjn Hermannsen appeared as the purported corporate representative of Tor Husjord Shipping A/S. Mr. Hermannsen testifies that Mr. Husjord could not appear because "he is out traveling." (2/1/00 tr., P., L.1), and/or busy in another case (2/1/00 tr., P.3, L.11-13), but could be available in one week. (2/1/00 tr., P.3, L.7-8). Upon the Court's questioning of the Mr. Hermannsen, it was apparent that he was employed by an entity known as Tor Husjord Management and no admissible proof of this corporate capacity was presented. Moreover, Mr. Hermannsen testified that there was no entity known as Tor

Husjord Shipping, A/S and Krosby confirmed that there had been no such entity for several years. Krosby again requested a continuance so that Mr. Husjord could personally appear and testify as to the Plaintiff's identity and Krosby's authority to prosecute the lawsuit. Near the end of the hearing, Krosby represented to the Court that Mr. Husjord could personally appear and testify as to the Plaintiff's identity and Krosby's authority to prosecute the lawsuit. Near the end of the hearing, Krosby represented to the Court that Mr. Husjord was not present because he had a "terrible accident." (2/1/00 tr., P.42, L.10-11). Yet Mr. Hermannsen, one of only five employees of Mr. Husjord's companies, did not mention the terrible accident earlier in the hearing. The Court continued the hearing to February 4, 2000, a date which Krosby represented that Mr. Husjord would appear. (2/1/00 tr., P.44, L.3-10).

On February 4, 2000, Krosby was 30 minutes late in making his appearance. Krosby initially blamed his tardiness on a Houston traffic jam (2/4/00 tr., P.19, L.20-21), then later admitted he was late because he was

translating a fax from Norway. (2/4/00 tr., P.20, L. 19-25). Mr. Husjord did not appear and Krosby filed another Motion for Continuance on the grounds that Mr. Husjord could not travel abroad for four weeks "for health reasons." When questioned under oath, Krosby first testified that Mr. Husjord had colon cancer (2/4/00 tr., P.23, L.25), then later stated that a blood clot in Mr. Husjord's leg prevented travel (2/4/00 tr., P.27, L.4-9).

The Court conducted oral arguments. Krosby orally moved to withdraw Plaintiff's Motion for Writ of Mandamus, which this Court granted. The Court then withdraw the reference to the Bankruptcy Court, issued a Permanent Injunction against further lawsuits by Plaintiffs without leave of Court, and ordered Mr. Husjord to personally appear on March 16, 2000, and show cause pursuant to Rule 17(a) F.R.C.P. The Court further ordered Krosby to appear on March 16, 2000, and show cause why he should not be sanctioned. Krosby represented to the Court that Mr. Husjord would be available to appear on March 16, 2000. (2/4/00 tr., P.41, L.12-14, P.70, L.7-12).

On March 15, 2000, Krosby filed another Motion for Continuance on behalf of Tor Husjord Shipping, A/S, on the grounds that Mr. Husjord could not appear because a shop owned by him sank near Singapore and he needed to attend claims negotiation meeting in Norway. Exhibit 1 to the March 15 Motion to Continue does not indicate that the shipping accident had just occurred. The letter reminds Mr. Husjord of 'ongoing negotiations" which require Mr. Husjord's presence in Norway for two weeks. On March 16, 2000, Krosby appeared, but again Mr. Husjord failed to appear. The Court allowed Krosby to make oral arguments and took evidence of attorneys fees from counsel for all Defendants.

II. DISCUSSION

Rule 11(b), F.R.C.P. provides that when an attorney presents a pleading to the court, by signing, filing, submitting or later advocating, he or she is certifying as follows:

That to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, degenses, and other legal contentions therein are warranted by existing law or by a nonfrivoloous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

--Rule 11(b), F.R.C.P.

Rule 11 further provides that if subdivision (b) is violated, the court may impose sanctions upon the attorneys, law firms, or parties who violated subdivision (b) or are responsible for the violation. Only counsel can be sanctioned for violations of Rule 11(b)(2). Rule 11(c)(2)(A), F.R.C.P. As required by the Rules, the Court determines that the following conduct constitutes a violation of Rule 11, warranting sanctions:

1. Frivolous Pleading

A. The Amended Complaints

The Plaintiff's First, Second, and Third Amended Complaints, were filed without the Court's permission. Rule 15(a), F.R.C.P., requires leave of court to amend pleadings after a responsive pleading has been filed. All of Plaintiff's proposed amended complaints were outside the time during which a plaintiff can amend without leave under Rule 15(a), F.C.R.P. Plaintiffs sought to leave to file their First Amended Complaint, but it was taken under advisement and never granted by the bankruptcy court. No motion for Leave to File the Second or Third Amended

Complaint was filed, nor was leave to file ever orally requested. When an amendment is filed without leave of court, after the time when amendments can be made as a matter of right, it is without legal effect and new matters contained in it should not be considered. *Hoover v. Blue Cross & Blue Shield of Alabama*, 855 F.2d 1538, 1544 (11th Cir. 1988).

"Under Federal Rule of Civil Procedure 15 (a), leave to amend shall be freely given when justice so requires. However, leave to amend is by no means automatic." *Parish v. Frazier,* 195 F.3d 761, 763 (5th Cir. 1999). Grounds for denying amendment include "delay, bad faith, dilatory motive, or undue prejudice to the opposing party." *Martin Herend Imports, Inc., v. Diamond & Gem Trading,* 195 F.3d 765, 770 (5th Cir. 1999). A court may deny leave to which could have been avoided by plaintiff's due diligence is one example of undue prejudice. *Id.* When a party seeks leave to amend to raise new theories of recovery after the opposing party files a motion for summary judgment, leave to amend is more carefully

scrutinized. *Id.* At 764. Thus, even if Plaintiffs sought leave to amend, denial of their motion may have been justified.

Moreover, the Original, First, Second, and Third Amended Complaints were filed in bad faith for the purpose of harassing Defendants in an attempt to obtain a settlement for Plaintiff, and were filed without first conducting a reasonable inquiry into the facts of this case or the applicable law. For instance, Plaintiffs' Complaint ignores the res judicata effect of the bankruptcy court's approval for Browning's compensation. *See, matter of Intelogic Trace, Inc.*, 200 F.3d 382 (5th Cir. 2000). The Original, First, Second, and Third Amended complaints were signed by Krosby, and were used to pursue a course of conduct in which Defendants were forced to hire attorneys and participate in frivolous litigation.

The Original Complaint was filed against Browning and Kleberg. The original Complaint was grounded solely on breach of contract and in it Plaintiffs admitted that Browning was not a fiduciary and could only be held liable

for willful misconduct, bad faith or gross negligence shown by clear and convincing evidence. The Original Complaint also alleged Kleberg owed creditors a fiduciary duty which it breached by not firing Browning and that Kleberg committed malpractice. The bankruptcy court held in its memorandum Opinion on Confirmation of Creditor plan or reorganization that neither Kleberg nor its individual members represented any party other than the law firm itself. That memorandum opinion is final and non-appealable. Moreover, under Texas law, there is no attorney-client relationship absent a shoeing of privity of contract, and an attorney owes no professional duty to a third party or non-client. *Banc One Capitol Partners Corp v. Kneipper,* 67 F.3d 1187, 198 (5th Cir. 1995). An attorney-client relationship will not be readily imputed in the absence of a sufficient shoeing of intent. *Id* Despite the lack of any facts to support its claim, Plaintiffs sued Kleberg.

Plaintiffs filed a motion for leave to file their First Amended Complaint, but the bankruptcy court never ruled

on the motion. The First Amended Complaint added a cause of action against Browning for breach of fiduciary duty, despite Plaintiffs' prior admission that Browning was not a fiduciary. All of Plaintiffs' allegations surrounding the decline in value of the Vessel. The only mention of Debtor's real estate assets in the First Amended Complaint was an allegation that Browning's attempt to sell both the Vessel and real estate together caused delay in the sale of estate assets.

The Second Amended Complaint added a claim that Browning sold real estate for less than its fair market value. The Second Amended Complaint also added Continental for the first time. Although Plaintiffs' never obtained leave to amend, Continental was forced to appear and defend itself from Plaintiffs' groundless allegations because Plaintiffs' sought to have Continental and its counsel held in contempt and sought sanctions against them.

The Third Amended Complaint was not filed until after the bankruptcy court granted Browning and Kleberg's Motion for Summary Judgment and after Plaintiffs

appealed the bankruptcy court's order on summary judgment and dismissal. The Third Amended Complaint was only filed as an attachment to other pleadings – the motion for Transmittal Order and the Motion for Writ of Mandamus, never as a stand alone pleading. Leave of court was never sought for filling the Third Amended Complaint. The Third Amended complaint added a cause of action for RICO. The Fifth Circuit recognized the need to adequately and timely plead a cause of action under RICO in *Price v. Pinnacle Brands, inc.*, 138 F.3d 602 (5th Cir. 1998). There, the District Court denied Plaintiff's motion for leave to amend and the Fifth Circuit Court of Appeals affirmed, nothing that Plaintiffs had three opportunities to adequately plead their case, but failed to do so. *Id* at 608. A motion for leave to amend to add complex RICO claims was denied in *Ferguson v. Roberts*, 11 F.3d 696 (7th Cir. 1993), because the amendment was a tactic to postpone the trial date. A District Court's denial of leave to amend after the close of evidence was affirmed in *Triad Electric & Controls, Inc. v. Power Systems Engineering, Inc.*, 117

F.3d 180 (5th Cir. 1997). For the first time, Plaintiffs also complained in their Third Amended Complaint, that real estate was sold without court approval, yet Krosby later argued that Plaintiff's cause of action for Browning's alleged misconduct in selling real property of the Debtor's estate was never addressed by the bankruptcy court. In fact, this cause of action was never timely or properly added to Plaintiffs' Complaint. Plaintiffs' attempt to amend their Complaint after the bankruptcy court granted Defendants' summary judgment, and while appeal was pending, demonstrates Krosby's and his client's willingness to change their position every time errors were pointed out, in a desperate effort to revive their frivolous pleadings.

All four complaint allege that Tor Husjord Shipping, A/S, is a corporation organized under the laws of Norway. Krosby admitted in court, however, that he did not know the corporate status of Tor Husjord Shipping, A/S, and alternatively stated that the corporation was in liquidation or had changed its name.

The "gravamen," as Krosby calls it, of all of Plaintiffs' complaints is Browning's conduct as Trustee. Yet Plaintiff Tor Husjord Shipping, A/S's first lawyer, Robert Woolsey ("Woolsey"), participated in all aspects of the bankruptcy. Woolsey assisted Browning and agreed to his actions. Moreover, Krosby assisted Woolsey in drafting pleadings and briefs in the main bankruptcy case prior to his entry of appearance. The sale of the Vessel was approved without objection. Plaintiff and both of its counsel were fully aware of Browning's conduct throughout the case and never objected.

B. Other Pleadings

The Pleadings signed and filed by Krosby on behalf of Plaintiffs demonstrate that no reasonable inquiry was made prior to filing and the claims are not warranted by existing law. For example, the motion of issuance of writ of mandamus was filed to ask the District Court in Brownsville to order the bankruptcy court to send Plaintiffs' Motion to Withdraw the Reference to the Brownsville District Court for ruling. Krosby argues in the

Motion that Rule 5011 (b) of the Local Bankruptcy Rules for the Southern district of Texas, which provides that the bankruptcy court hears motions to withdraw the reference and makes a recommendation to the District Court.

The Motion for Writ of Mandamus further states that "the action [i.e. Plaintiffs' Complaint] was extended to include an action on the bond and Continental was joined as a defendant," yet Plaintiffs never obtained leave to file any amended complaint. Krosby and Plaintiffs thus misrepresented the facts. The Motion for Writ of mandamus relies on Plaintiffs' Third Amended Complaint and its new allegation of RICO violations, yet that complaint was filed only as an exhibit to other motions and leave to file it was never sought.

The Motion for Writ of Mandamus also argues that the reference should be withdrawn to the Brownsville division. The District Court has jurisdiction to hear appeals from final judgment, orders, and decrees of bankruptcy judges. 28 U.S.C. §158 (a)(1). Once venue of a bankruptcy adversary proceeding is transferred, the District Court in

the new venue is the appellate court because as appeal under §158 (a) is taken "only to the district court for the judicial district in which the bankruptcy judge is serving "28 U.S.C. §158(a). Krosby alleged that Defendants want the Corpus Christi District Court to hear the motion because "judges and attorneys in the Corpus Christi area have close contacts with each other because they live in the same city." Krosby's suggestion of this Court's lack of impartiality merely because this court sits in the same city as the bankruptcy court and the litigants is outrageous. Adherence to Krosby's logic would upset the entire bankruptcy appellate system. Finally, the Motion for Writ of Mandamus alleges that Defendants "attempt to prevent Tor Husjord Shipping, A/S, from having access to the courts of justice by fraudulently trying to have plaintiff's complaint dismissed without a trial on the merits." Krosby demonstrates his lack of understanding of the Federal Rules of civil procedure by implying that litigant may not seek dismissal under Rule 12(b), F.R.C.P. Krosby later orally

moved to withdraw his Motion for Writ of Mandamus and his RICO pleadings. (Transcripts of 2/4/00, P.31, L.9-13).

As further example of the frivolous actions and pleadings, Krosby alleged in letters to continental that the surety bond was invalid, but later filed suit on the same sureth cond. Krosby made written demand for a settlement conference and threatened to file suit, seek contempt, and pursue criminal action if Continental did not oblige. Krosby, further alleged that the bankruptcy court had jurisdiction over Continental pursuant to Rule 9025, F.R.B.P., but later assured in various pleadings that the bankruptcy court did not have jurisdiction.

Krosby and his client continued a frivolous and harassing course of conduct by alleging that all defendants ad their counsel committed either criminal acts or improper conduct subject the sanctions. Among the allegations are 1) that Browning obstructed sales of assets (despite his derived judicial immunity as found by the bankruptcy court); 2) that Kleberg was negligent, in violation of its responsibility pursuant to the Liquidating Trust Agreement

and also violated its professional responsibility (despite Kleberg's lack of duty to Plaintiff and the absence of malpractice as found by the bankruptcy court), 3) that Browning, James T. McMillen, Thomas Busby, Walter Cicack and Shelby Jordan (attorneys for Defendants) should be held in civil contempt, 4) that opposing counsel engaged in unethical conduct; 5) that Continental made false allegations (see, "Motion by Plaintiffs for leave in File Response to New Issues Raised During the Hearing on November 30, 1198"); 6) that Shelby Jordan lied to the court; 7) that Browning violated various criminal statutes relating to bankruptcy fraud, criminal contempt of court, fraudulent misrepresentations to the bankruptcy court, violation of Texas Penal Code §32.45 regarding misapplications of fiduciary property (see, Motion requesting that the Court submit a Report to the United States Attorney pursuant to 18 U.S.C. §3057); 8) that Continental concealed the existence of a document from creditors and violated the Texas Insurance Code; 9) that Continental ad Browning violated the bankruptcy code and

other United States laws; 10) that Browning made false statements under oath; and 11) that bankruptcy Judge Schmidt should be recused (Krosby later admitted that no ground exist for recusal [2/4/00 tr., P.19, L.1-18]).

Krosby's Allegation of Continental's violation of Article 21.21 of the Texas Insurance Code was not warranted by existing law. A simple inquiry into the applicable law reveals that Article 21.21 of the Texas Insurance Code is inapplicable to a commercial surely. See, *Great American Insurance Company v North Austin Municipal Utility District,* 908 S.W. 2d415 (Tex. 1995), Nevertheless, Krosby filed a Second Amended Complaint seeking to add to cause of action against Continental on the basis. Moreover, the complaint against Continental was barred by the statute of limitation when it was filed. Overlooking an elementary principal such as the statue of limitations can hardly be called a reasonable inquiry into either the law of the facts. Plaintiffs also filed a motion to join all creditors by the Debtor as plaintiffs in this lawsuit,

yet Krosby admitted that he had no authority to act on any other creditor's behalf. (Transcript of 2/4/00, P.49, l.1-15).

On September 24, 1999, Plaintiffs filed a Motion for Order Adjudging Defendant Harrell Z. Browning, Shelby A. Jordan, Matthew A. Rosenstein, and Continental Insurance Company in Civil Contempt (the "Motion for Contempt"). Plaintiffs base their Motion for Contempt on statements made by Browning in his Affidavit in Support of Motion for Summary judgment (the "Affidavit"). In the Affidavit, Browning states that "[e]ach sale of mine in administration of this estate was approved by an order of the Bankruptcy Court, entered upon notice to all the creditors, including plaintiffs." Plaintiffs complain that the Affidavit is false and made in bad faith because Browning did not obtain bankruptcy court approval of his sales of real estate. Plaintiff allege that Shelby Jordan and Matthew Rosenstein committed contempt because at the July 12, 1999, hearing they failed to tell the bankruptcy court that Browning did not obtain court approval of real estate sales. The Affidavit cannot be considered false or misleading

when read in the context of 1) the fact that no live pleading dealing with real estate was involved, 2) the objected to language only appears under the section headings dealing with the sale of the Vessel; ad 3) summary judgment granted by the bankruptcy court was not dependant on a finding by the bankruptcy court that a sale of real estate was approved by the court. Moreover, civil contempt is inappropriate to these circumstances. "Civil contempt is designed to force the contemnor to comply with an order of the court," unlike Rule 11, F.R.C.P., which is designed to punish a party who has already violated the court's rules." *Willy v. coastal Corp.,* 503 U.S. 131, 139 (1992). The Motion for Contempt alleges no circumstances authorizing any punishment by civil contempt. Here is yet another attempt by Plaintiffs and Krosby to resurrect their pleading, after receiving adverse ruling from the bankruptcy court, and their disregard of the Federal Rules of Civil Procedures and Federal Rules of Bankruptcy Procedure.

Many of the matters discussed above are basic legal principles, taught to first year law students. Krosby's

course of conduct in this litigation demonstrates a total lack of reasonable inquiry and a total misunderstanding or, worse, disregard for existing law and rules.

2. Misrepresentations regarding the real party in interest.

This case was initially brought in the name of Tor Husjord Shipping, A/S (among other defendants who have now dismissed their appeal and are not part of this ruling). The Court's concern over the substance of this litigation caused it to query Krosby regarding his authority to represent his client. Upon such questioning, it was apparent that the real party in interest in this case is not clear. Krosby has been less that candid about the corporate status of Tor Husjord Shipping A/S. (Tr. P.28, l.14-15). Mr. Hermannsen, their purported corporate representative, however, testified that he works for Tor Husjord Management and the Tor Husjord Shipping, A/S, does not have any employees (tr. P.32, l.23-25), and that the name changed four years ago (Tr. P.32, l.23-25). Mr.

Hermannsen also testified that he did not know if Tor Husjord Shipping, A/S closed when the name changed.

At the February 4, 200, hearing, Krosby stated that the Tor Husjord Shipping, A/S, certificate of incorporation states that it "is a corporation and a liquidation" (Tr. P.37, L.7-14), which has been in liquidation since 1994, three years before this lawsuit was filed. (Tr. P.37, L.23). Later, Krosby stated that Mr. Husjord has 28 companies and all five of his employees are the same for Tor Husjord Shipping, A/S, Tempo, A/S, and all of the other companies. (Tr. P.38, L.13-20). For the first time, Krosby then stated that Tor Husjord Shipping, A/S, changed its name to Tempo, A/S, which he represented was the correct name of his client. (Tr. P.39, L.1-2, P.46, L.12-13). Krosby told the court he did not know about the name changes (Tr. P.47, L.19), that he had just learned that the correct name was Tempo, A/S (Tr.P.55, l.7-10), but that Tor Husjord Shipping A/S was still the correct name of the corporation. (Tr. P.55, l.3-4).

Krosby's statements to this Court make it clear that he has no idea who his client is or the corporate status of his purported client. Mr. Husjord never appeared in this Court not in the bankruptcy court, and no admissible documentary evidence was submitted to demonstrate the real party in interest in this case. Again, Krosby demonstrated his propensity to change the facts or his theories of recovery when errors were pointed out. The bankruptcy court gave Tor Husjord Shipping, A/S, every opportunity to appear and prove its case. The bankruptcy court finally required the Plaintiffs to post a cost bond. Plaintiffs ignored this order. In hindsight, the bankruptcy court was correct to require a cond because the existence of Tor Husjord Shipping, A/S, the remaining Plaintiff, is in doubt.

The court grants Defendants; unopposed motion to further name the Plaintiff as Tor Husjord Shipping, A/S d/b/a Tor Husjord Management, d/b/s Tempo A/S.

3. Tor Husjord's failure to appear.

Krosby's stated reasons for Mr. Husjord's

Failure to appear included health problems, business problems, and lack of sufficient notice of the hearing. Each of the stated excuses might be legitimate grounds for a continuance, but Krosby never presented any admissible evidence to prove the "excuse of the day." Moreover, the excuse changed at every new query from the Court. For instance, at the January 26, 2000, hearing, Krosby told the Court that Mr. Husjord was not present because he lives in Norway and was unable to make timely travel arrangements because of the long distance and short notice. (Tr. P.1, L.20-21, p.2, L.1-32).

At the February 1, 2000, hearing, Mr. Hermannsen testified that Mr. Husjord did not appear because "he is out traveling," and it was "very short notice." (Tr. P.3, L.1-2). Mr. Hermannsen further testified that Mr. Husjord was busy in another case in Norway which was planned before this Court's hearing. (Tr. P.3, l.11-13). Later, at the same hearing, Krosby told the Court that Mr. Husjord had a terrible accident. (Tr. P.42, L.10-11).

At the February 4, 2000, hearing, Krosby stated that Mr. Husjord could not travel abroad due to "health reasons." (Tr., P.21, L.10-13). The first alleged health reason was colon cancer (Tr., P.23, L.25), which Krosby then admitted Mr. Husjord does not presently have. (Tr., P.24, L.10-12). The second alleged health reason was a blood clot in Mr. Husjord's leg (Tr., P.24, l.19-21), or some type of circulation problem (Tr, P.26, L.22). The third and final medical excuse was that Mr. Husjord had a serious accident while traveling in Singapore at Christmas time. (Tr., P.27, L.5-7)

At the march 16, 2000, hearing, Krosby represented that Mr. Husjord could not appear because a ship owned by him sank near Singapore and Mr. Husjord needed to attend claims negotiation meetings in Norway. Exhibit 1 to Krosby's Motion for Continuance does not indicate when the shipping accident occurred. The letter purports to remind Mr. Husjord of "ongoing negotiations" which required his presence in Norway for two weeks.

In short, the excuses given for Mr. Husjord's failure to spear changed during any given hearing, and from hearing to hearing. The record demonstrates the Krosby was willing to tell the court anything to justify Mr. Husjord's failure to appear. Krosby misrepresented his client's location, status, and health condition to avoid the necessity for is appearance. Mr. Husjord repeatedly demonstrated his unwillingness to appear in court. Mr. Husjord demonstrated the same reluctance to appear for depositions. The bankruptcy court ultimately had to order Mr. Husjord to appear for depositions. He allegedly traveled from Norway to Houston, Texas, but could not make it to Corpus Christi due to bad weather. Mr. Husjord never appeared for deposition. Mr. Husjord's failure to appear raised the authority question and prevented the Court from determining the proper parties.

4. Continuances for Lack of Proper Plaintiff Representative

Krosby filed three Motions for Continuance with this Court in which he sought an extension of the hearing date

so that a representative of his client could attend the hearing as that Mr. Husjord, the president of Plaintiff, would be available at the next hearing set by the Court. At each subsequent hearing, Mr. Husjord did not appear and Krosby filed yet another motion for continuance.

At each hearing in which his client failed to appear, after arguing the various excuses for non-appearance discusses above, Krosby represented to this Court that if a continuance was granted, his client was able and willing to appear. At the January 26, 2000, hearing Krosby assured the court that Mr. Husjord could appear on February 1, 2000. (Tr., P.4, L.4-8). At the February 1, 2000, hearing, Krosby told the Court "I will get him here." (Tr., P.44, l.6-7). At the February 4, 2000, hearing, Krosby represented to the Court that Mr. Husjord could appear in four weeks (Tr., P.70, L.9-12), and that he would be available on March 5, 6, or 8. (Tr., P.41, L.12-14). At each subsequent hearing, Mr. Husjord did not appear.

Mr. Husjord was ordered to appear in this Court three times. The only witness to appear was Mr.

Hermannsen, a purported corporate representative, who in fact works for Tor Husjord Management and had no authority to bind the Plaintiff, Tor Husjord Shipping, A/S. Moreover, Mr. Hermannsen knew nothing about the ongoing litigation. It appears that Mr. Husjord never intended to travel to Corpus Christi from Norway to appear in this lawsuit. Krosby, however, continued to pursue his frivolous, non-meritorious, and vexatious course of conduct.

5. Reliance on Norwegian law.

The court instructed Krosby that to rely on a foreign law, he must plead and prove the foreign law. (transcript of 2/4/00 hearing, P. 39, L.3-10, P.40, l.3-7). Krosby repeatedly attempted to rely on Norwegian corporate law, without properly raising the issue. The Federal Rules of Civil Procedure provide as follows:

> A party who intend to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not

submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

--Rule 44.1, F.R.C.P.

Krosby relied on the law of Norway to explain the corporate identity of Plaintiff Tor Husjord, A/S, and to explain the function of a liquidating board in Norway. The Advisory Committee Notes to Rule 44.1 state that "the court is free to insist on a complete presentation [of foreign law] by counsel." Rule 44.1 is silent o the effect of a failure to prove that foreign law. Generally, the proponent of an issue of foreign law loses if he fails to prove that law. *Cuba R.R. Co. v Crosby,* 222 U.S. 473, 32 S. Ct. 132 (1912); *Symonette Shipyards, Ltd. V. Clark, 365 F.2d N.V.,* 514 F.2d 1130, 1137 n.14 (3rd Cir. 1975), cert. Denied, 423 U.S. 869 (1975) (applying law of the United States Virgin Islands instead of the law of the Netherlands Antilles because no effort was made to prove the foreign law); *Gehling v. St. Geroge Univ. School of Medicine,* 698 F. Supp. 419, 422 (E.D.N.Y. 1998)(applying new York law

when parties failed to prove Grenadian law). Krosby relied on Norwegian law without pleading or proving it. Krosby was instructed that he had to plead and prove Norwegian law, but never did. This Court was therefore entitled to apply the law of the United States.

Plantiff and Krosby were repeatedly ordered to obtain the in court services of a Norwegian interpreter. This order also fell on deaf ears.

Krosby never obtained official translations. Instead, Krosby presented documents with his own translations from Norwegian to English. His slight of hand went further on one occasion when he had an unofficial translation certified as correct by the Norwegian Consulate, then argued that the consulate's translation certification was proof that the document was an official Norwegian public record or document.

Krosby also argued that neither he nor his client is subject to sanctions because of treaties between the United States and Norway, but never plead or proved the treaties. Even more ludicrous is Krosby's argument that neither he

or his client, as Norwegian citizens, are subject to the law or jurisdiction fo this court, while at the same time he attempted to seek relief in the United States. Under Krosby's theory of jurisdiction, a foreign citizen may bring a lawsuit in the United States Courts, never appear for discovery, trial, or when ordered by the Court, and obtain a judgment against United States citizens, but never be liable for damages himself.

6 **Failure to provide a Norwegian interpreter.**

Krosby was ordered to provide an interpreter for any hearing at which language was an issue. No interpreter was provided. Mr. Hermannsen was obviously unable to understand the proceedings when he appeared and should have had an interpreter. Krosby attempted to coach Mr. Hermannsen in Norwegian during the hearing. Krosby himself often relied on the language barrier as an excuse for "misunderstanding" the Court's questions and offing mis-information. Moreover, Krosby brought numerous documents written in Norwegian and attempted to offer his

translation to the Courtin blatant disregard of the Court's Order.

7. Erling R. Krosby's Conduct

a. Misrepresentations in Krosby's *Pro Hac Vice* Motion.

On May 30, 1997, Krosby filed his Motion for Admission *Pro Hac Vice* in the United States District Court for the Southern District of Texas, Brownsville Division. At the time his *Pro Hac Vice* Motion was filed, this case was pending in the District Court in Brownsville, but was subsequently referred to bankruptcy court and venue transferred to Corpus Christi by agreement of counsel for Plaintiffs. Krosby states in his *Pro Hac Vice* motion that his address is in Houston, Texas, but that he is admitted to practice in Pennsylvania. Krosby's *Pro hac Vice* Motion was granted on June 12, 1997. Krosby represented to the Court that he had a law office in Pennsylvania and was paret of a large law firm there. When pressed, Krosby admitted this was untrue, but that his original sonser in the Eastern District of Pennsylvania was a member of the

Pennsylvania law firm he listed. Krosby's admission of this fact occurred only after the Court asked Krosby if anyone at the Pennsylvania law firm would know Krosby of the Court called the law firm.

Krosby admitted that he had never practiced law in Pennsylvania (1/26/00 tr., P.18, L.14-19), that he failed the Texas Bar exam three or four times (1/26/00 tr., P.29, L.13-21), and that he in fact practices law out of his home in Houston, Texas. (1/26/00 tr., P.16, L.16-25, P.22, L.1-9). Krosby first represented that he made an average score on the Pennsylvania bar exam (1/26/00 tr., P.30, L.19-25), then later stated that he passed the Pennsylvania bar exam with very high grades. (2/1/00 tr., P.43, l.9-10). Krosby admitted that he has no license application presently on file with the Texas Supreme Court or the State Bar of Texas. Further, Krosby admitted that he has never taken a federal civil procedure course. Krosby avoids the need for admission to practice in the State of Texas by practicing only in federal court and obtaining admission *pro hac vice*. Krosby is not admitted to practice in the Southern District

of Texas (1/26/00 tr., P.14, l.14-25), but has, on one other occasion, received permission to appear *pro hac vice*.

Krosby has engaged in conduct which, if he were admitted to practice in the State of Texas or the Southern District of Texas, would subject him to disciplinary action. *See, Rule 1 and Appendix A. Local Rules of the united States District Court for the Southern District of Texas.* Krosby repeatedly drew attention to his lack of knowledge in all things Federal.

b. Failure to Appear in Court in Texas

Krosby appeared 30 minutes late to the February 4, 2000 hearing. The hearing was set for 3:00 p.m. Krosby was traveling from Houston. The Court talk judicial notice of the Southwest Airlines flight schedule, which indicates that there are three flights from Houston Hobby Airport to Corpus Christi which arrive in sufficient time to allow Krosby to appear at a 3:00 p.m. hearing. Krosby did not argue that his flight was delayed, but that he missed his scheduled flight because of traffic in Houston. (2/4/00 tr., P.19, L.19-25). Based on statements made by Krosby, it is

apparent that he was late because he was waiting for fax from his client which he attempted to use to prove a medical excuse for Mr. Husjord's failure to appear. The Local Rules of the United States District Court for the Southern District of Texas provides that people who appear in court must be punctual. *Appendix C. Courtroom Etiquette, Subsection A. Southern District Local Rules.* Krosby violated this rule.

c. Failure to Show Authority to Represent his Client

Krosby never complied with this Court's repeated orders to appear with his client and prove his authority to represent the Plaintiff. Krosby argued, however, that he was acting at all times of his client's instructions. The Court is led to believe that Krosby may be a "rouge," acting without any client authority, pursuing a cause of action which has no merit. Not being subject to the disciplinary rules of the State Bar of Texas frees Krosby to take outrageous positions and make repeated misrepresentations to the Court, believing he is not subject punishment. This

Court is left with no choice but to sanction Krosby.

III. SANCTIONS AGAINST ERLING R. KROSBY

1.Revocation of *Pro Hac Vice* admission

Permission to an attorney not admitted to practice in a court to appear *pro hac vice* is not a right but a privilege, which is in the discretion of the presiding judge. *Thomas v. Cassidy,* 249 F.2d 91, 92 (4th Cir. 1957). A court may revoke an attorney's *Pro Hac Vice* admission as a sanction for "unlawyerlike conduct." *Thomas v. Cassidy,* 249 F.2d 91 (4th Cir. 1957). Such conduct includes transgressions of local court rules, court orders, or Rule 11 violations, which are instances where an attorney's conduct involves "the integrity of the court system." *Nationalist Movement v. City of Cumming, Forsythe Court, Ga.,* 913 F.2d 885, 895 (11 Cir. 1990), aff'd 505 U.S. 123 (1992). When these transgressions occur, "the district court must be accorded some discretion in monitoring and its own processes." *United States v. Dinitz,* 538 F.2d 1214, 1219 (5th Cir.

1976)(en banc), cert. Denied, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556, (1977). "Hardball" litigation tactics or aggressive pursuit of a clients's interest by making reasonable objections is not included. *In re Evans,* 524 F.2d 1004, 1008 (5th Cir. 1975); *Schlumberger Technologies, Inc., v. Wiley,* 113 F.3d 1553 (11th Cir. 1997).

Pro Hac Vice admission may be revoked for making misrepresentations to the court and for engaging in dilaroty conduct; *Baldwin Hardware Corp. v. Franksu Enter. Corp.,* 78 F.3d 550, 555 & 562 (Fed. Cir. 1996), cert. Denited, 519 U.S. 949, 117 S. Ct. 360, 136 L.Ed.2d 251 (1996); for violating disciplinary rules, *MacDraw, Inc. v. CIT Group Financing Inc.,* 138 F.3d 33, 37 (2nd Cir. 1998); and ethical issues which the judge perceives as an attempt to "create a fraud on the court," *Nationalist Movement, supra.,* at 893. Here, the court notified Krosby of the charges against him in its Show Cause Order. The issue of revocation of *pro hac vice* admission was discussed on the record on February 4, 2000. (tr., P.76, L.4-

8). The Court conducted a hearing and Krosby was on clear written notice of the court's concerns and was allowed an opportunity to explain his actions. See, *Nationalist Movement, supra.* at 894. Krosby's course of conduct as outlined above demonstrates his violation of the Federal Rules of Civil Procedure and of Orders of the Court, his disregard for the Rules of Professional Conduct, and his headlong pursuit of a frivolous lawsuit. For these reasons, the Order Admitting Erling R. Krosby *Pro Hac Vice* should be vacated instanter and his admission to appear in this case revoked.

2. Monetary Sanctions

Krosby engaged in a frivolous, harassing course of conduct. He presented pleadings signed by him for improper purposes, and needlessly increased the cost of this litigation. Rule 11, F.R.C.P. The claims defenses and legal contentions pleading signed by Krosby are not warranted by existing law or by a nonfrivolous argument for the extension modification or reversal of existing law. Rule 11, F.R.C.P. The allegations in Pleadings signed by Crosby

and in Crosby's oral representations lacked evidentiary support. Accordingly, Crosby is subject to sanctions pursuant to Rule 11, F.R.C.P. Moreover, Crosby should be further held liable for the excess cost, expenses, and attorneys' fees reasonable incurred because he violated 28 U.S.C. §1927, by unreasonably and vexatious multiplying the proceedings in this case. Section 1927 is penal in nature and must be strictly construed so that the "legitimate zeal of an attorney in representing [his or] her client is not dampened." *Browning v. Kramer*, 931 F.2d 340, 344 (5th Cir. 1991). Other courts have written that Section 197 should be employed only in instances evidencing a serious disregard for the orderly process of justice. *FDIC v. Conner,* 20 F.3d1376, 1384 (5th Cir. 1994). Evidence of Recklessness, bad faith, or improper motive must be present. *Travelers Inc. Co. v. St. Jude Hospital of Kenner, LA.*, 38 F.3d 1414, 1416 (5th Cir. 1994). The Court finds that under the plain terms of Section 1927, Krosby's multiplication of the proceedings was both unreasonable and vexatious. *F.D.I.C. v. Conner, supra.* At 1384.

Krosby's actions go far beyond mere negligence. *See, Baulch v. Johns,* 70 F.3d 813, 817, (5th Cir. 1995); *Browning v. Kramer, supra.* At 344.

Sanctions are also appropriate under Rule 8020, F.R.B.P., for the frivolous appeal, which provides:

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double cost to the appellee.

--Rule 8020 Fed.R.Bankr.Pro.

Krosby was on notice via the pleadings on file that Appellees Browning, Kleberg, and Continental intended to request sanctions for frivolous appeal. The Fifth Circuit Court of Appeals cautioned counsel who represent appellants that "there can be a little tolerance for unmerited appeals without articulable support in the law." *Coghlan v. Starkley,* 852 F.2d 806, 809 (5th Cir. 1988)(interpreting

Rule 38, F.R.A.P., which Rule 8020 mirrors). The court went on to note that "[a]ppeal as of right does not translate into propriety of appeal when counsel can make no reasonable argument for extension, modification, or reversal of precedent clearly elaborated by the [lower] court opinion." *Id* In this case, the bankruptcy court's opinions are well-reasoned and grounded in precedent. Crosby plunged head long into his appeal, rehashing the arguments he has made for the last three years. As in *Coughlan,* Krosby's appeal was more an attempt to persuade this court that the bankruptcy court should have reached an opposite opinion based on his recitation of the facts. *Id.* at 808-09. Other courts addressing this issue have found appeals to be frivolous "if the briefs or arguments attempt to address the issues, but cite no authority or inapplicable authority, make unsubstantiated factual assertions or bare legal conclusions, or misrepresent the record." ¶ 8020.04[1], *Collier on Bankrupcty,* Vol 10 (15th Ed. 2000)(citations committed).

For the reasons set for above, the Court find that monetary sanctions against Erling R. Krosby are warranted.

The Court find that appropriate monetary sanctions are the reasonable and necessary attorneys fees incurred by Defendants for their attendance at the three hearings in District Court that would Mr. Husjord failed to appear:

In favor of Continental Insurance in the amount of $1,575.00 against Erling R. Krosby

In favor of Harrell Z. Browning in the amount of $1,440.00 against Erling R. Crosby

In favor of Kleberg & Head, P.C., n/k/a The Kleberg Law firm in the amount $3,995.65 against Erling R. Krosby.

IV. SANCTIONS AGAINST PLAINTIFF, TOR HUSJORD SHIPPING, A/S, d/b/a TOR HUSJORD MANAGEMENT, and d/b/a TEMPO, A/S

The history of this case reflects that the Plaintiff, Tor Husjord Shipping, A/S, d/b/a Tor Husjord Management and Tempo, A/S (the "Tor Husjord Plaintiffs") blatantly failed and refused to obey orders of this court to appear. Throughout the course of this litigation, the Tor Husjord

Plaintiffs sought to avail themselves of United States Courts without ever appearing. The court was not able to ascertain whether Krosby has any authority to represent his clients, nor who in fact is the actual client. Dismissal would be appropriate under Rule 17(a), F.R.C.P., alone, but this case goes much farther to merit dismissal.

First, the case should be dismissed for failure to prosecute, pursuant to Rule 41(b) F.R.C.P. "A district court may dismiss an action for failure of plaintiff to prosecute or to comply with any order of the court. The court possesses the inherent authority to dismiss the action sua sponte, without a motion by a defendant." *McCullough v. Lynaugh,* 835 F.2d 1126, 1127 (5th Cir. 1988); *Martinez v. Johnson,* 104 F.3d 769 (5th Cir. 1997), cert. Denied, 522 U.S. 875 (1997). Mr. Husjord, individually, and as corporate representative, was ordered to appear in this Court three times, but wholly failed to do so. Mr. Husjord's excuses for non-appearance were vague at best, if not outright fabrications. Mr. Husjord appeared in the

main bankruptcy case, the Adversary Proceeding, or for depositions.

The Fifth Circuit Court of Appeals has consistently held that a case should be dismissed with prejudice "only upon showing a clear record of delay or contumacious conduct by the plaintiff, ...and where lesser sanctions would not serve the best interest of justice." *Pond v. Braniff Airways, Inc.*, 453 F.2d 347, 349 (5th Cir. 1972); *Salinas v. Sun Oil Company*, 819 F.2d 105, 106 (5th Cir. 1987); *Dorsey v. Scott Wetzel Services, Inc.*, 84 F.3d 170, 171 (5th Cir. 1996). If ever there were a case which merited dismissal for want of prosecution, it is this one. The excuses given by Krosby for Mr. Husjord's failure to appear were disingenuous at best, morphing from health problems to business problems and back again at each hearing. The only evidence presented by Krosby for Mr. Husjord's failure to appear was a copy of a letter from a doctor who lives or works next door to Mr. Husjord, stating that Mr. Husjord "for health reasons cannot travels abroad for the next 4 weeks." The letter was not based on personal

knowledge, did not state that the doctor was Mr. Husjord's treating physician, and did not state the medical condition which allegedly prohibited travel. No admissible evidence for Mr. Husjord's failure to appear was ever presented. Tor Husjord Shipping, A/S, and Mr. Husjord, Individually, demonstrated a total lack of interest in prosecuting the matter.

Second, dismissal is also appropriate for failure to comply with the Federal Rules of Civil Procedure and Orders of this Court. Rule 41(b), F.R.C.P. The Tor Husjord Plaintiffs willfully failed to follow this Court's Orders by failing to appear on at least three occasions and by failing to provide an interpreter. Moreover, that Tor Husjord Plaintiffs' pattern frivolous non-meritorious and vexatious litigation, and misrepresentations is well-documented in the procedural history and the conduct of the Tor Husjords Plaintiffs' counsel recited above.

The actions taken by the Tor Husjords Plaintiffs, their willful failure to appear and to obey the Court orders together with repeated violations of the F.R.C.P. constitutes

a clear record delay in contumacious conduct. Lesser sanctions will not serve the best interest of justice because it is clear that Mr. Husjord never intends to appear before this Court. For the foregoing reasons, the Court finds that Adversary No. 97-2171-C should be dismissed with prejudice for failure to prosecute the and as a sanction for failure to comply with the Federal Rules of Civil Procedure.

V. DEFENDANTS' ENTITLEMENT TO FEES AND COSTS

Kleberg's original answer contains a counterclaim for attorneys fees, costs, and expenses Browning sought recovery of attorney fees mended motion to recover attorneys fees as part of final judgment both defendants rely on the terms of Creditor plan every action the plan provides for the recovery of attorneys fees costs and expenses and article 111 state's any event supposed Confirmation litigation the liquidating trustee or the Plan

creditors and any party in interest arising under concerning or relating to the Creditor plan including without limitation collection matters, eligibility matters, or any matters described Article VII of Creditor plan, the liquidating trustee or the plan creditors, as the case may be, shall recover from the opposing party in its interests its reasonable attorneys fees, costs, and expenses incurred in connection with such matters to the extent that the Court determines that the liquidating trustee or the Plan creditors has prevailed in the matter. In his context "prevailed" shall include, without limitation:

(A) that claim has been vessel wall or subordinated in whole or in parts

(B) that able transfer has been avoided in whole or in parts

(C) that any backward for judgment or interpleader claim was resolved substantially in favor of the liquidating trustee or the Plan creditors

(D) that any claim concerning any breach of the liquidating trustee's duties was resolved substantially in favor of the liquidating trustee

(E) that any claim concerning breach of or interpretation of the creditor plan its provisions purposes and intact was resolved substantially the liquidating trustee from plan creditors

Pursuant to the terms the plan, both Browning, under subsection D and Kleberg, under subsection E, are entitled to recover their attorneys fees costs and expenses because they are the successful parties to this litigation. The Plan was confirmed by the bankruptcy court in order Confirmation is final in non-appealable under the doctrine of *res judicia,* Plaintiffs may not re-litigate Browning and Kleberg's entitlement to fees, costs, and expenses. *Matter of Baudion,* 981 F.2d 736 (5th Cir. 1993).

Browning incurred fees, costs, and expenses in the amount of $72,072.17. Kleberg incurred fees, costs, and expenses in the amount of $28,239.21. The court finds that the fees, costs, and expenses incurred by Browning and

Kleberg are reasonable and necessary, taking into account the results obtained and the facts and circumstances of this case. Moreover, Plaintiffs did not object to the reasonableness of the fees, costs, and expenses.

VI. MOTION FOR SANCTION S OF CONTINENTAL AND ITS COUNSEL

Continental Insurance Company ("Continental") was never properly joined as a defendant to this proceeding. Plaintiffs never obtained leave of court to amend their complaint to add Continental. Nevertheless, Continental was forced to appear and defend itself against Plaintiffs' frivolous requests for sanctions against Continental and its counsel, and groundless claims of perjury and theft. Continental was forced to make at least fifteen appearances and file over twenty pleading in the bankruptcy court. This Court, having withdrawn the reference to the bankruptcy court, finds that Continental's Motion for Sanctions should be granted.

Based on the Court's findings herein, it is clear that the Tor Husjord Plaintiffs demonstrated a total lack of

reasonable inquiry into the facts. The Tor Husjord Plaintiff made allegations which lacked evidentiary support and engaged in a frivolous, harassing course of conduct, and should be subject to sanctions pursuant to Rule 11, F.R.C.P. Continental incurred reasonable and necessary fees, costs, and expenses in the amount $66,758.00, to which the Plaintiffs did not object, and judgment should enter against Tor Husjord Shipping, A/S, d/b/a Tor Husjord Management, and d/b/a Tempo, A/S, in favor of Continental Insurance Company.

Matt Rosenstein, counsel for Continental, was also forced to obtain his own his own counsel to defend Plaintiffs' motion for contempt. Mr. Rosenstein filed his Reply to Plaintiffs' Motion for Order Adjudging Defendant Harrell Z. Browning, Shelby A. Jordan, Matthew A. Rosenstein and Continental Insurance Company in Contempt on October 18, 1999. In his Reply, Mr. Rosenstein alleged that the Motion for Contempt was filed in violation of Rule 11, F.R.C.P. and Rule 9011, F.R.B.P. and sought to recover his fees and expenses incurred in

defending himself. For the reasons set forth herein, the Court further finds that Mr. Rosenstein's request for relief should be granted and the reasonable and necessary fees and expenses incurred by him should be awarded as sanctions against Tor Husjord Shipping, A/S, d/b/a Tor Husjord management, A/S, d/b/a Tempo, A/S. The Court finds that fees and expenses in the amount of $4,421.38, are reasonable and necessary, taking into consideration the results obtained and the facts and circumstances of this case. Moreover, neither Plaintiffs nor Krosby objected to the reasonableness of the fees and expenses.

VII. CONCLUSION

The bankruptcy court exercised tremendous patience and gave Plaintiffs and their counsel every opportunity to plead and prove their case, but Plaintiff wholly failed to do so. This Court, having withdrawn the reference to the bankruptcy court and fully reviewed *de nova* the complete record and history of this case, and for the reasons set forth herein, finds that judgment should enter against Plaintiffs Tor Husjord Shipping, A/S, d/b/a

Tor Husjord Management, d/b/a Tempo, A/S, and Erling R. Krosby. A separate judgment shall be entered in conformance with these findings of fact and conclusions of law.

Dated this 28th day of April, 2000.

JANIS GRAHAM JACK

United States District Judge

United States District Court
Southern District of Texas
ENTERED May 01 2000
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

TOR HUSJORD SHIPPING A.S.,
ET AL.
Plaintiffs CIVIL ACTION No. 99-00448
VS. Formerly Adversary No. 97-2171-C
HARRELL Z. BROWING, ET AL.
Defendants

FINAL JUDGMENT

On this day came on for consideration the above-referenced Adversary Proceeding. In conformance with the findings of fact and conclusion of law entered herewith, the Court enters judgment as follows:

It is hereby ORDERED that the Order Admitting Erling R. Krosby *Pro Hac Vice* is hereby VACATED and his admission to appear in this case is hereby REVOKED.

It is further ORDERED that monetary sanctions are hereby imposed against Erling R. Krosby, individually, and

judgment awarded as follows, for which let execution issue:

In favor of Continental Insurance in the amount of $1,440.00, plus interest at the rate of 6.197%

In favor of Kleberg & Head, P.C., n/k/a The Kleberg Law Firm in the amount of $3,995.66, plus interest at the rate of 6.197%

It is further ORDERED that Adversary No. 97-2171-C is hereby DISMISSED WITH PREJUDICE for failure to prosecute and as a sanction for failure to comply with the Federal Rules of Civil Procedure.

It is further ORDERED that the unopposed Oral Motion to Amend of Harrell Z. Browning is hereby GRANTED and the pleading are hereby AMENDED to identify the Plaintiff Tor Husjord Shipping as Tor Husjord Shipping, A/S, d/b/a Tor Husjord Management, and d/b/a Tempo, A/S.

It is further ORDERED that Continental Insurance Company's Motion for Sanctions is hereby GRANTED and Continental is awarded its reasonable attorneys' fees and

expenses in the amount of $66,758.00, plus interest at the rate of 6.197% against Tor Husjord Shipping, A/S, d/b/a Tor Husjord Management, and d/b/a Tempo, A/S, for which let executive issue.

It is further ORDERED that Defendant Kleberg & Head, n/k/a The Kleberg Law Firm's counterclaim for attorneys fee, expenses, and costs is hereby GRANTED and Kleberg & Head is hereby awarded judgment in the amount of $28,239.21, plus interest at the rate of 6.197% against Tor Husjord Shipping, A/S, d/b/a Tor Husjord Management, and d/b/s Tempo, A/S, for which let execution issue.

It is further ORDERED that the Motion of Plaintiffs Tor Husjord Shipping, A/S, d/b/a Tor Husjord Management, and d/b/a Tempo, A/S, Memories, Inc., Marcus Byrd, and Majestic, Inc. for Contempt is hereby DENIED.

It is further ORDERED that Matthew A. Rosenstein's counterclaim for sanctions contained in this Reply to the Plaintiffs' Motion for Contempt is hereby

granted and judgment is awarded in favor of Matthew A. Rosenstein against Tor Husjord Shipping, A/S, d/b/a Tor Husjord Management, and d/b/s Tempo, A/S, and Erling R. Krosby, in the amount of $4,421.38, plus interest at the rate of 6.197%, for which let execution issue.

Dated this 28th Day of April, 2000

JANIS GRAHAM JACK

United States District Judge

United States District Court
Southern District of Texas
ENTERED May 01 2000
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE: CASE No. 91-26594-11

BURTON SECURITIES, INC. CHAPTER 11

TOR HUSJORD SHIPPING A.S.,

ET AL.

Plaintiffs ADVERSARY No. 97-2171-B

VS.

HARRELL Z. BROWING,

ET AL.

Defendants

MEMORANDUM OPINION AND ORDER GRANTING AMENDED MOTION FOR SUMMARY JUDGMENT BY DEFENDANT HARRELL Z. BROWNING

On this day came on for consideration Defendant's Amended Motion for Summary Judgment evidence and after hearing arguments in support of and in opposition to such Motion, finds that there are no genuine issues of material fact and the Amended Motion for Summary Judgment should be granted. In support thereof, the Court finds as follows:

UNCONTROVERTED FACTS

1. Browning was appointed as the Trustee to administer the creditor-proposed Chapter 11 Liquidating Plan of Burton Securities, Inc. By "Order Appointing Liquidating Trustee" dated November 30, 1991.

2. Browning was appointed by Order of this Court to perform the Trustee duties set forth in the Burton Securities, S.A., Liquidating Trust Agreement (the "Trust

Agreement") executed between Burton and Browning after Court approval.

3. Browning was not to conduct any ongoing business of the Debtor-Burton and did not do so.

4. The Creditor Liquidating Plan provided an express limit of liability for any actions of conduct of Browning in "willful misconduct", "bad faith" in the administration of the duties as Trustee or, "gross negligence" in the administration of the Trust Agreement, which must be established by "clear and convincing evidence" standard.

5. The Trust Agreement was established pursuant to the terms of the Creditor Liquidating Plan of reorganization (the "Plan") in the Burton Securities Chapter 11 Case. The Trust Agreement provides that Browning is not a fiduciary nor governed by a fiduciary duty as a result of his service as the liquidating trustee. The Trust Agreement provides that only certain specified causes of action may be brought with respect to Browning's conduct as the Trustee, as set out in paragraph 4, above. The Trust

Agreement specifically exempts Browning from any "breach of contract" damages for his "performance" or in the administration of the Trust Agreement, or for his discretionary decisions or actions and specifically provides for a limitation of actions for only the tortuous conduct set out above.

6. No part or portion of the claims alleged against Browning deal with any conduct other than his conduct in the capacity of Trustee pursuant to the Trust Agreement.

7. Plaintiffs, as creditors in the Burton Securities Chapter 11 Case, co-sponsored the Plan which was filed on March 13, 1992.

8. The Creditor Liquidating Plan provides that a "Trustee" shall be appointed by the Bankruptcy Court, and that the Trustee shall never have certain rights, including the right to hire lawyers to represent the Trust.

9. Plaintiffs, as creditors in the Burton Securities Chapter 11 Case, voted to accept the plan.

10. Browning never retained himself, or his firm, as a lawyer for or on behalf of the Trust and Browning has never represented the Trust as its lawyer.

11. Plaintiffs claim a right to bring and prosecute this suit solely as a result of the Creditor Liquidating Plan and Trust Agreement, claiming to be three (3) of the beneficiaries thereof (notwithstanding the fact that two of putative plaintiffs are dissolved corporations and these Plaintiffs seek all of the alleged damages for themselves, not for all creditors of the Creditor Liquidating Plan estate.

12. The Plaintiffs never sought leave of the Bankruptcy Court prior to filing suit against Browning in his capacity as Trustee of the Plan.

13. The Le Mistral Vessel owned by Burton Securities was a primary Plan asset transferred to the trust created by the Plan to be administered by Browning in accordance with the Trust Agreement and the Plan.

14. According to Plaintiffs; Complaint, all alleged damages resulted prior to May 30, 1995, (two years

before this suit was filed) and all such alleged damage was known to Plaintiffs prior to that time.

15. Browning made numerous attempts to sell or lease the Vessel, including the following:

a. Browning negotiated and sought Court approval of a charter lease of the Vessel to Vegas at Sea, but at the December 21, 1992, hearing he announced that the charterer backed out of the deal

b. Browning field a Motion to Sell the Vessel to Siena Investment Inc., which was approved by the Court on September 14, 1993. The sale was never consummated.

c. Browning negotiated with Big Bear Cruise Lines, as reflected by Big Bear's Memorandum filed September 14, 1993.

d. Browning then filed a Motion to Sell the Vessel to Europa Cruises, which was approved by Order entered July 15, 1994. The sale to Europa also never took place.

e. Finally, on December 20, 1994, Browning filed his Third Motion to Sell the Vessel, this time to Casco Bay Lines. The Seconded Amended Order Approving this sale was entered April 26, 1995. This sale was ultimately consummated.

16. Browning was not responsible for the failure of the prior proposed sales to be consummated.

17. Both the Court and Browning experienced frustration at the failed attempts to sell the Vessel and all participating parties were pleased with the ultimate disposal of the Vessel at the time.

18. Browning sold the Vessel on May 5, 1995, for a net $325,000.00. Plaintiffs allege that Browning could have obtained a higher selling price had he maintained the vessel better. Accordingly, all conduct and all damages alleged occurred or accrued as of May 5,

19. Plaintiffs were notified in accordance with the Bankruptcy Rules of Procedure well in advance of the Trustees' motion for an order approving Browning's negotiated contract to sell the Vessel, and had the

opportunity to complain or object to the conduct of Browning in attempting to sell, and in selling, the Vessel.

20. Plaintiffs attended each hearing on the issue of the propriety and best interest of the estate regarding the sale of the Vessel and were represented at each hearing by an attorney, yet never raised an objection to the conduct of Browning in his continued attempts to sell the Vessel.

21. Plaintiffs never complained or objected to the Trustee's requested relief, notwithstanding:

* The Participation by Plaintiff's lawyer Woolsey in rendering legal advise and negotiating strategy, and drafting the written agreements regarding, the various attempts to sell the Vessel; and

* Their prior notice of the hearing, their opportunity to be heard, their attendance at each hearing through their attorney Erling Krosby and Robert W. Woolsey, and their failure to file or assert any objection to the conduct of the Trustee seeking to sell the Vessel.

22. The orders approving each effort to sell the Vessel are final and non-appealable, and no attempt was ever made by Plaintiffs to appeal.

23. After all sales were authorized, and completed, Browning filed an application to be paid for his services, and serve Plaintiffs and their attorneys with copies and with notice of the time and place for hearings thereon.

24. After receipt of such application and after having been afforded timely notice to object, Plaintiffs never complained or objected to the Trustee's fee application.

25. The orders approving compensation for Browning are final and non-appealable, and no attempt was ever made by Plaintiffs to appeal

26. In addition to notifying Plaintiffs of Browning's request for a Court Order approving his conduct prior to each and every attempt to conduct a sale of the Vessel, Browning hired, on behalf of the estate, as special counsel to the estate, the attorney representing Plaintiffs in this Bankruptcy case, Mr. Robert W. Woolsey, a recognized expert in Admiralty law.

27. Browning did not conduct any negotiations, nor enter into any agreement with any prospective purchaser, without the prior or contemporaneous advise and/or participation of the counsel for Plaintiff Tor.

29.0 Each decision made by Browning and for which Plaintiffs complain was made in the exercise of Browning's good faith business judgment, after review of all available material facts which included discussion with Kleberg & Head and with Robert W. Woolsey, Bob Cornelison (Director of the Port Isabel navigation District), the captain and engineers on the Vessel; and Browning's lawyer James McMillen. In addition to the foregoing, Browning used his own business experience (having been a Trustee from time to time in over 500 cases and over a period of 20 years), regarding business.

30. Every material action by the Trustee, of which the Plaintiffs' complain, was the subject of this Court's order approving the action.

JURISDICTION

1. This Court has exclusive jurisdiction to determine property of the estate, as a core proceeding pursuant to 28 U.S.C. §§ 1334 and §157(b)(2)(B). All claims arose out of the jurisdiction of this Bankruptcy Court and its orders, as well as the plan confirmation, all of which provided for Bankruptcy Court jurisdiction as a result of Plaintiffs' having filed claims in the estate and participated in the case.

2. This Court has exclusive jurisdiction to determine claims against the estate and the Trustee of the estate pursuant to 28 U.S.C. §157.

3. This Court has to determine whether this suit may be maintained against a Trustee appointed by this Court on behalf of the estate at all, without prior authority to bring such a suit, pursuant to ***Barton v. Barbor,*** 104 U.S. 126 (1881) and this Court's equitable powers to administer the estate.

STANDARDS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c), applicable here pursuant to Rule 7056. F.R.B.P., provides that summary judgment should be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, shoe that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c further provides that an interlocutory summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Rule 56(d) provides that if on motion, judgment is not rendered for all the relief asked and a trial is necessary, then the court at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The court then shall make an order specifying the facts that appear without substantial

controversy, including the extent to which the amount of damages or other relief is no in controversy, and directing such further proceedings in the action as are just. Based on the above provisions of Rule 56 (c) and (d), the Fifth Circuit has approved interlocutory summary adjudication:

> In cases that involve complicated fact patterns and multiple causes of action, summary judgment may be proper as to some cases of action but not as to others, or as to some issues but not as to others...A careful and meticulous analysis – first by the parties, but ultimately by the court – will aid significantly in preventing the waste of private and judicial resources and time.

Baker v. Norman 651 F.2d 1107, 1123 (5th Cir. 1981)

When bringing a motion for summary judgment, the moving party bears the initial responsibility of informing the Court of the basis for the party's motion, identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which demonstrate the absence of any genuine issue of material fact. ***Celotex Corp. V. Catrett,*** 477 U.S. 317, 323; 106 S.Ct. 2548, 2553; 91 L.Ed.2d 265,

274 (1986). While the moving party must demonstrate such absence of any genuine issue of material fact, the moving party has no express or implied obligation to negate the opponent's claim. *Id.*

The purpose of Federal Rule of Civil Procedure 56 is to enable a party who believes that there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues. ***Little v. Liquid Air Corp.***, 37 F.3d 1069, 1075 (5th Cir. 1994), *citing* ***Lujan v. National Wildlife Federation,*** 497 U.S. 871, 880 (1990). After adequate time for discovery and upon motion, Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden at trial. ***Little,*** *supra. Citing Celotex, supra.* The complete failure of proof concerning an essential element of that party's case necessarily renders all other facts immaterial. ***Celotex,*** *supra.* At 322-23; 2552; 273.

The mere existence of some actual dispute will not defeat an otherwise properly supported motion for summary judgment. It is the requirement that there be no genuine issue of material fact. ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 247-28; 106 S.Ct. 2505, 2510; 91 L.Ed.2d 202, 211 (1986) (emphasis in original). A material fact is one which might affect the outcome of the suit under the governing substantive law; irrelevant or unnecessary fact disputes so not occur. *Id.* The opposing party's burden is not satisfied by some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. ***Little,*** *supra* at 1075 (citations omitted). It is the function of the judge to determine whether there is any genuine issue for trial. ***Anderson,*** *supra* at 249, 2510-2511, 212. The judge may reject incredible evidence. ***Ralston Purina Co v. Hobson,*** 554 F.2d 725, 728-29 (5th Cir. 1977); *See also,* ***Stitt v. Williams,*** 919 F.2d 516 (9th Cir. 1990)

DISCUSSION

1. PLAINTIFFS FAILED TO OBTAIN COURT AUTHORITY TO COMMENCE AN ACTION AGAINST BROWNING AS TRUSTEE OF THE LIQUIDATING TRUST.

Browning was appointed the Liquidating Trustee pursuant to the terms of a confirmed Chapter 11 Plan and in accordance with the provisions of § 1129 of the Bankruptcy Code. Accordingly, no suits may be brought by the parties in interest to the Plan, without leave of court being first obtained. *See,* ***Burton v. Barbor,*** 104 U. S. 126 (1881); ***Matter of Linton,*** 136 F. 3d 544 (7th Cir. 1998); 28 U.S.C. 959. This doctrine is well established in the Fifth Circuit. In ***Boullion v. McClanahan,*** 639 F.2d 213 (5th Cir. 1981), the bankruptcy judge appointed McClanahan as receiver and later as trustee of the Boullion estate. None of the orders of the bankruptcy judge were challenged by a direct appeal. Instead, the Boullions filed a diversity action in federal district court alleging that the Trustee had violated his fiduciary duties as trustee by recommending an

inexperienced appraiser; allowing the filing of an incorrect appraisal; improperly handling sales of the estate property; and failing to surrender disclaimed and exempt assets. "All of McClanahan's actions were approved by orders of the bankruptcy judge." *Id.* At 214. The Trustee moved for summary judgment on the ground that as a trustee appointed by the bankruptcy judge and as to actions directed or approved by that judge he was entitled absolute immunity. Summary Judgment was granted.

> In the instant case the court-appointed trustee was acting under the supervision and subject to the orders of the bankruptcy judge. We hold that since McClanahan, as an arm of the Court, sought and obtained court approval of his actions, he is entitled to derived immunity. Citing ***McCray v. State of Maryland***, 456 F.2d 1 (4th Cir. 1972); ***T & W Investment Company, Inc. v. Kurtz,*** 588 F.2d 801 (10th Cir. 1978); ***Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno,*** 547 F.2d 1 (1st Cir. 1976); ***Bradford Audion Corp V. Pious,*** 392 F.2d 67 (2nd Cir. 1968); ***Smallwood v. United State,*** 358 F. Supp. 398 (E.D.Mo. 1973), aff'd without opinion, 558 F.2d 1035 (8th Cir. 1977).

--*Id.* At 214

The Fifth Circuit also noted that as in this case, "[I]f the Boullions felt, as they later attempted to claim in an independent action, that the trustee and the bankruptcy judge had acted erroneously or wrongfully, (they should have sought review, a course that was open to them as a matter of right." *Id.*

Plaintiffs seek to recover money damages from the Trustee to apply, not to creditors of the trust debt, but to their own claims. This suit is not permitted without leave first obtained. *Id.* The Creditor Plan in this case provided for exclusive jurisdiction of suits against the Trustee to be filed in the Bankruptcy Court. The Plaintiffs themselves provided (as a proponent of the Plan) that his Court retained its equitable jurisdiction to determine exactly the dispute brought by the Plaintiffs against the Trustee. Plaintiffs never requested not obtained leave of court to prosecute this section. Accordingly, summary judgment should be granted in favor or Browning and the action dismissed on this ground alone.

II. ALL ACTIONS TAKEN BY BROWNING WERE APPROVED BY COURT ORDER AFTER NOTICE TO PLAINTIFFS AND HEARING, AND ARE BARRED BY THE DOCTRINE OF RES JUDICATA.

Every aspect of this case arises out of the voluntary participation of the Plaintiffs in the claims administration process of this Bankruptcy Court, including the requirement that this Court retain jurisdiction over this claim as set forth in the Plain, to which the Plaintiffs were creditor-proponents. As a result of the conduct, and expressed intent of the Plaintiffs, this adversary proceeding is a "core" proceeding pursuant to 28 U.S.C. § 157 (B).

The Plaintiffs were parties to all aspects of this case, for the purpose of application of *res judicata* or claims preclusion doctrines. The voluntary participation need only be the filing of a claim and creditors become "partied" to the contested matters, the administration matter (to which they have notice) and the Plan confirmation and discharge process. Voluntary participation in the claim administration process waives a jury trial. ***Katchen v.***

Landy, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966). In ***Granfinanciera, S.A. v. Nordberg,*** 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), the court held that a creditor who had not filed a claim against the estate was entitled to a jury trial on the trustee's fraudulent transfer claim. *Id.* At 36, 109 S.Ct. at 2787. The Plaintiffs in this case did far more than simply file a claim. They became Plan proponents, requesting that this Court bind the debtor and all parties in interest to the Plan provision.

Plaintiffs sued the Trustee alleging that his liquidation of the Vessel, conducted pursuant to the Plan and Trust Agreement, was in "bad faith", with "willful disregard", and by "grossly negligent" conduct. Plaintiffs complain that sales were lost, and that the ultimate sale resulted in damages to the Plaintiffs as beneficiaries of the estate, as a result of conduct of Browning and Trustee under the terms of the Plan. It is undisputed that each attempted sale, and the final sale of the Vessel, including the negotiations leading up to the sale and the actual written agreements concerning such sale, were reviewed in open

court after notice to all creditors, including Plaintiffs, and approved ad being in the best interest of the estate. No evidence was presented to indicate that the failure to close the prior negotiated sales were due to any fault of Browning, nor even to mere negligence. The uncontroverted evidence, clearly reflected in the record of the main case, it that Browning worked diligently to negotiate and close a sale of the vessel.

Further, it is undisputed that after notice to all creditors, including Plaintiffs, this Court approved as justified, reasonable, and due, the fees of the Trustee for his services in the very conduct made the basis of Plaintiffs' complaint.

Such claims and causes of action are therefore barred by the doctrine of *res judicata*. ***Matter of West Texas Marketing Corp.,*** 12 F.3d 497, 500 (5th Cir. 1994). Each and every order entered by this Court is final. ***Matter of West Texas Marketing Corp.,*** *supra.*, sets out the recognized elements of res judicata:

(1) the parties must be identical in the two actions;

(2) the prior judgment must have been rendered by a court of competent jurisdiction

(3) there must be a final judgment on the merits; and

(4) the same cause of action must be involved in both cases

--*Id.*

This four-part test had been applied in the bankruptcy context to an order confirming a plan of reorganization. *See,* ***Matter of Howe,*** 913 F.2d 1138, 1143 (5th Cir. 1990); ***Republic Supply Co. v. Shoaf,*** 815 F.2d 1046, 1053 (5th Cir. 1987). In this case, there is an exact identity of parties because each Plaintiff was a creditor represented by counsel at each stage of the proceedings.

The doctrine of *res judicata* applies in this case. In each occasion complained by the Plaintiffs, this Court held a hearing to determine if the terms and provisions of a sale were in the best interest of the estate. The Plaintiffs were parties and appeared. Additionally, the conduct of Browning was the basis of his application for payment of fees, and after a contested hearing on this matter, the fees were allowed. Plaintiffs had the opportunity to attend and

participate, but with full knowledge, made no objection and interposed no appeal of this Court's final orders. *Res judicata* applies to bar all of Plaintiffs claims. On this ground alone, summary judgment should be granted and the case should be dismissed.

III. BROWNING'S ACTION WERE IN ACCORDANCE WITH THE "BUSINESS JUDGMENT RULE" AND AS A MATTER OF LAW ARE NOT ACTIONABLE.

The Trust Agreement disclaims any fiduciary duty imposed on Browning, and defines the extent to which he may have any liability. Nevertheless, in determining Brownings right to make business decisions so as to liquidate the estate, the business judgment rule applies to Browning's conduct. *See, eg.,* ***Commodity Futures Trading Commission v. Weintraub,*** 471 U.S. 343, 353, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985), which deals with the standards imposed upon the functioning of a corporate trustee in the context of a bankruptcy case. "The Business

Judgment Rule presumes that the agents (trustees, directors, officers)...may not be held liable unless the Plaintiff, Trustee here, first shows that Defendants engaged in Either self-dealing, fraud or bad faith." ***In re Donald Sheldon & Co., Inc.,*** 186 B.R. 364, 369-70 (S.D.N.Y. 1995). The definition of this rule matches almost identically the burden of proof (clear and convincing) and the limited causes of action which may be brought against Browning, as set out in the Trust Agreement, approved by final order of this Court.

Texas Courts likewise define the business judgment rule. In ***Langston v. eagle Publishing Co.,*** 719 S.W.2d 612, 616 (Tex. App.—Waco 1986), writ ref'd n.r.e), it was held that under business-judgment rule, conduct that is merely unwise, inexpedient, or imprudent will not sustain suit against management of corporation by shareholders. *See, also* ***Cleaver v. Celaver,*** 935 S.W.2d 491, 496 (Tex. App. – Tyler, 1996); ***Accent Energy Corporation v. Gillman,*** 824 S.W.2d 274, 278 (Tex. App. – Amarillo 1992, writ denied) [Under the "business judgment" rule,

alleged unwise, inexpedient, negligent, or imprudent decisions or conduct will not sustain a suit against the management of a corporation by the shareholders.] Thus, in order for Plaintiffs to state a cause of action they must set forth facts which evidence more than "unwise, inexpedient, negligent, or imprudent decisions or conduct" attributable to Browning. Langston, *supra.*

Not only must this evidence meet the high burden of "clear and convincing", but it must be sufficient to overcome the recognized presumptions in law. As set out in **Texaco, Inc. v. Pennzoil, Co.,** 729 S.W.2d 768 (Tedx. App. – Hou [1 Dist.], 1987), the business judgment rule is based on a presumption that in making a business decision, the directors acted on an informed basis, in good faith, and in the honest belief that the actions action was in the best interests of the company." *Id. At 808, citing* ***Smith v Van Gorkom,*** 488 A.2d 858, 872-73 (Del.1985). No such evidence exists in this case, none has been plead, and summary judgment is proper absent clear and convincing evidence.

The Fifth Circuit recognizes that "more exacting scrutiny would slow the provision for private control of administration of the estate, and threaten the courts ability to control a case impartially." ***Richmond Leasing Co. v. Capital Bank, N.A.,*** 762 F.2d 1303, 1311 (5th Cir. 1985); ***In re O.P.M. leasing Services, Inc.,*** 23 B.R. 104, 118 (Bankr.S.D.N.Y. 1982). The Bankruptcy Code gives the trustee wide-ranging management authority over the debtor's assets. ***Commodity Futures Trading Commission v. Weintraub,*** 471 U.S. at 352. In exercising this authority for the benefit of the estate, the trustee is allowed considerable discretion; the adequacy and propriety of his acts are governed by a "business judgment" rule. *See, e.g.,* ***In re Holiday Isles, Ltd.,*** 29 B.R. 638, 641 (D. Minn. 1982), aff'd, 693 F.2d 48 (8th Cir. 1983). This suit is an attempt to second guess the Trustee's business judgment long after the fact. No evidence meeting the burden of "clear and convincing" proof exists sufficient to overcome the presumptions applicable to the Trustee's action s under

the business judgment rule and the suit should be dismissed on this ground alone.

IV. PLAINTIFFS' CLAIMS ARE BARRED BY THE TWO-YEAR STATUE OF LIMITATIONS

Plaintiffs' claims sound exclusively, in tort, notwithstanding the fact that these claims are based on the contractual limitation from which they arise. Plaintiffs principally complain of conduct of Browning occurring in 1993 and 1994 as a result of lost sales of the Vessel. The suit was not brought until 1997, not less than three years, and initially over four (4) years after part of the alleged misconduct, and in every event more than two years after the final sale of the Vessel.

All of this conduct was, as admitted in Plaintiffs' complaints, known to them, as demonstrated by Plaintiffs allegation that they made numerous complaints either to or concerning Browning during this time. According to Plaintiffs Complaint, all the damages resulted before May 30, 1995, and all such damage was known to Plaintiffs prior to that time.

Plaintiffs allege that "Browning did not succeed in selling the vessel until May 5, 1995, for a net $325,000.00." Accordingly, substantially all conduct and all damages alleged accured or accrued as of May 5, 1995, two years and 25 days before suit was filed by Plaintiffs. Plaintiffs do not allege any "discovery rule" facts or make any such allegations which would bring their claims or cause of action within the time proscribed by statue to maintain this suit.

In ***Askanase v. Fatio,*** 130 F.3d 657 (5th Cir. 1997), the Fifth Circuit recognized that under Texas Law, the two-year statute of limitations governed a trustee's trust fund claims alleging that a Chapter 7 debtor's directors breached their duties when they cause debtor and its subsidiaries to make certain payments to them and their businesses. *Id.* Breach of duties, alleged by a creditor against a Trustee, particularly where the creditors is not a party to a contract with the Trustee, Is governed by the two-year statue of limitations.

The Court finds that Plaintiffs' causes of action sound in tort and were therefore barred by the applicable statue of limitations on May 5, 1997, at which time no suit was pending, and the Complaint should be dismissed on this ground alone.

V. PLAINTIFFS' CANNOT STATE A CLAIM AGAINST BROWNING FOR ATTORNEY MALPRACTICE

Plaintiffs' suit is based upon the Trust Agreement, as if Plaintiffs are parties tot hat agreement. They are not. Notwithstanding that fact, the Trust Agreement does not provide for retention or payment of Browning as an "attorney." Browning never retained himself or his law firm as a lawyer for the Trust, and Browning was not retained by the Plaintiffs in any capacity, much less as their lawyer. Browning never filed an application to retain a lawyer, or himself, on behalf of the Trust. Finally, Browning had no authority to be compensated for legal

work and never sought such compensation. Even if Browning was retained by the Trust or by a Court order as an attorney, (which he was not) it is the well-established rule in Texas that third persons, outside the attorney-client relationship, have no negligence actions against an attorney. *See,* ***Bell v. Manning***, 613 S.W.2d 335, 338 (Tex. Civ. App.—Tyler, 1981, writ ref'd n.r.e.); ***Barcelo v Elliot,*** 923 S.W.2d 575, 577 (Tex. 1996). Browning owed no duty to the individual creditors as potential beneficiaries of the Trust, but to the Trust itself, which owns the cause of actions and which is the only party that could prosecute a claim against browning for damages alleged to have been suffered on behalf of the Trust.

Absent retention of Browning as an attorney, Browning has no duty or obligation, as an attorney to Plaintiffs, and none is plead. Absence of a duty defeats a cause of action for negligence. ***Welch v. McDougal,*** 876 S.W.2d 218 (Tex. App. –Amarillo 1994, error denied). A legal duty must exist before a defendant may be held liable in negligence. ***Tirplex Communications, Inc. v. Riley,***

900S.W.2d 716, 720 (Tex. 1995). As a matter of law, no cause of action for attorney malpractice were plead to support the allegations set forth in Plaintiffs' complaint.

Moreover, as a matter of law, any claim for attorney malpractice is governed by a two-year statue of limitations. Accordingly, this cause of action is barred as a matter of law, and should be dismissed.

CONCLUSION

For all of the reasons set forth above, the Court finds that there are no genuine issues of material fact and Defendant Browning is entitled to summary judgment as a matter of law.

It is therefore, ORDERED, that Defendant Harrell Z. Browning, Trustee is granted summary judgment in his favor on all of Plaintiffs' pleadings against him.

Signed this 19 day of March, 1999.

RICHARD S. SCHMIDT
Chief Judge
United States Bankruptcy Judge

United States District Court
Southern District of Texas
ENTERED
March 19, 1999
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE: CASE NO. 91-26594-11

BURTON SECURITIES, INC. CHAPTER 11

TOR HUSJORD SHIPPING A.S.,

ET AL.

Plaintiffs

VS. ADVERSARY No. 97-2171-C

HARRELL Z. BROWING, ET AL.

Defendants

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT KLEBERG & HEAD, P.C.'S MOTION FOR PARTIAL SUMMARY ADJUDICATION

On this day came on for consideration the Motion for Partial Summary Adjudication filed by Defendant Kleberg & Head, P.C. ("Kleberg & Head"). The Court, having heard the arguments of counsel and upon review of the summary judgment evidence and the pleadings, finds that there are no genuine issues of material fact and Kleberg & Head's Motion should be granted. In support thereof, the Court finds as follows:

UNCONTROVERTED FACTS

Kleberg & Head, P.C. now known as The Kleberg Law Firm, ("Kleberg & Hed") represented Burton Securities, Inc., in an admiralty action against a former charterer of the gaming/cruise ship previously owned by Burton Securities, Inc., and operated out of Brownsville, Texas. Burton Securities, Inc. subsequently filed its own voluntary petition for reorganization under Chapter 11 of

the bankruptcy Code on August 14, 1991. Kleberg & Head then became a creditor of the debtor for unpaid legal services arising form its prior representation of the debtor. Plaintiffs, Tor Husjord Shipping A.S., Memories, Inc./Marcus Byrd, and Majestic, Ltd./Marcus Byrd, ("Husjord/Byrd") also appeared as creditors of the debtor.

On December 1, 1992, this Court entered its Memorandum Opinion the Creditor Pan of Reorganization. The Proposed Creditor Plan of Reorganization was authored by Kleberg & Head on behalf of all creditors. Husjord/Byrd specifically were signatories to the proposed plan claiming a conflict of interest arising from Kleberg & Head's service as debtor's former counsel following by alleged representation of creditors. The Court in its Memorandum Opinion under its Findings of Fact found that Kleberg & Head represented only itself and other creditors. Furthermore, the Court, under its Conclusions of Law, held that Kleberg & Head did not represent any other creditor. The Court's Memorandum Opinion is a final, non-appealable Order and the law of this case. Moreover,

Husjord / Byrd stated in its pleading titled Comments of Tor Husjord Shipping, A/S, that Mr. Dyson was counsel only to his own firm. All of the other creditors were represented by their own individual attorneys who had earlier appeared on their behalf in this case." This statement constitutes a judicial admission that Kleberg & Head did not represent Husjord / Byrd.

Harrell Z. Browning ('Browning") was proposed, appointed, and duly qualified as a liquidating trustee under the Liquidating Trust Agreement pursuant to the confirmed creditor Plan of Reorganization. Browning then set about to liquidate the debtors' assets, including the gaming / cruise ship. Browning entertained a number of prospective purchasers of the ship in 1993 and 1994. Browning sold the ship in 1995.

The confirmed Creditor Plan of Reorganization and the Liquidating Trust Agreement provide that the liquidating trustee may be removed by Kleberg & Head with or without cause at any time. Husjord / Byrd's counsel in the first part of 1994 requested Kleberg & Head

with or without cause at any time. Kleberg & Head that that time declined to do so. Husjord / Byrd took no other action to attempt to remove Browning . Instead, Husjord / Byrd filed this suit on May 30, 1997, for damages alleged as a result of the actions of Browning in selling the boat and the failure of Kleberg & Head to remove Browning.

JURISDICTION

This Court has exclusive jurisdiction to determine property of the estate, as a core proceeding pursuant to 28 U.S.C. §§ 1334 and §157(b)(2)(B). All claims arose out of the jurisdiction of this Bankruptcy Court and its order, as well as the plan confirmation, all of which provided for Bankruptcy Court jurisdiction as a result of Plaintiffs' having filed claims in the estate and participated in the case. This Court has exclusive jurisdiction to determine claims against the estate and the Trustee of the estate pursuant to 28 U.S.C. §157.

STANDARDS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c), applicable here pursuant to Rule 7056, F.R.B.P., provide that

summary judgment should be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) further provides that an interlocutory summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Rule 56(d) provides that if on motion judgment is not rendered for all the relief asked and a trial is necessary, then the court at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The court then sell make an order specifying the facts that appear without substantial controversy, and directing such further proceedings in the action as are just. Based on the above provisions of Rule 56(c) and (d), the

Fifth Circuit had approved interlocutory summary adjudication:

> In cases that involve complicated fact patterns and multiple causes of action, summary judgment may be proper as to some cases of action but not as to others, or as to some issues but not as to others...A careful and meticulous analysis – first by the parties, but ultimately by the court – will aid significantly in preventing the waste of private and judicial resources and time.

Baker v. Norman 651 F.2d 1107, 1123 (5th Cir. 1981)

When bringing a motion for summary judgment, the moving party bears the initial responsibility of informing the Court of the basis for the party's motion, identity those portions of the pleading, deposition, answers to interrogatories, and admission of file, together with the affidavits, if any, which demonstrate the absence of any genuine issue of material fact. ***Celotex Corp. V. Catrett,*** 477 U.S. 317, 323; 106 S.Ct. 2548, 2553; 91 L.Ed.2d 265, 274 (1986). While the moving party must demonstrate such absence of any genuine issue of material fact, the

moving party has no express or implied obligation to negate the opponent's claim. *Id.*

The purpose of Federal Rule of Civil Procedure 56 is to enable a party who believes that there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues. ***Little v. Liquid Air Corp.,*** 37 F.3d 1069, 1075 (5th Cir. 1994), *citing* ***Lujan v. National Wildlife Federation,*** 497 U.S. 871, 880 (1990). After adequate time for discovery and upon motion, Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden at trial. ***Little,*** *supra. Citing Celotex, supra.* The complete failure of proof concerning an essential element of that party's case necessarily renders all other facts immaterial. ***Celotex,*** *supra.* At 322-23; 2552; 273.

The mere existence of some actual dispute will not defeat an otherwise properly supported motion for summary judgment. It is the requirement that there be no genuine issue of material fact. ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 247-28; 106 S.Ct. 2505, 2510; 91 L.Ed.2d 202, 211 (1986) (emphasis in original). A material fact is one which might affect the outcome of the suit under the governing substantive law; irrelecant or unnecessary fact disputes so not occur. *Id.* The opposing party's burden is not satisfied by some metaphysical doubt as to the material facts, by conclusory allegartions, by unsubstantiated assertions, or by only a scintilla of evidence. ***Little,*** *supra* at 1075 (citations omitted). It is the function of the judge to determine whether there is any genuine issue for trial. ***Anderson,*** *supra* at 249, 2510-2511, 212. The judge may reject incredible evidence. ***Ralston Purina Co v. Hobson,*** 554 F.2d 725, 728-29 (5th Cir. 1977); *See also,* ***Stitt v. Williams,*** 919 F.2d 516 (9th Cir. 1990)

DISCUSSION

Husjord / Byrd's complaint as against Kleberg & Head depends upon the claimed existence of a duty by Kleberg & Head to the other creditors. Husjord / Byrd's assertion of such a duty is baseless. Husjord / Byrd acknowledge on page 35 of Plaintiffs' Amended Motion for Contempt, attached to Plaintiffs' Motion for Reconsideration of This Court's Order That Plaintiffs; Motion for Order Adjudicating Browning, et al., in Civil Contempt to Stricken, that this Court determined in its Memorandum Opinion on Confirmation of Creditor Plan of Reorganization that Kleberg & Head did not represent any other creditor. Husjord / Byrd then assert that the provision in the subsequent Liquidation Trust Agreement authorizing Kleberg & Head to remove the liquidating trustee without cause somehow fives rise to a fiduciary duty imposed upon Kleberg & Head for the benefit of the other creditors. Husjord / Byrd then assert that the provision in the subsequent Liquidating Trust Agreement authorizing

Kleberg & Head ro remove the liquidating trustee without cause somehow gives rise to a fiduciary duty imposed upon Kleberg & Head for the benefit of other other creditors. Husjord/Byrd cite no authority for the proposition that the inclusion of such provision in the liquidating Trust Agreement can itself give rise to a fiduciary relationship imposing any duty on Kleberg & Head for the benefit of the other creditor. To the contrary, Kleberg & Head's involvement in th eCreditors Plan of Reorganization without anything more does not give rise to a fiduciary relationship as a matter of law. ***Castillo v. First City Bank Corp. of Texas, Inc.,*** 43F.3d 953, 958 (5th Cir. 1994)

In order to establish liability for professional negligence or legal mapractice, a party must show the existence of a duty owed by an attorney, a breach of that duty, and damages arising from the breach. Under Texas law, there is no attorney-client relationship absent a showing of privity of contract, and an attorney owes no professional duty to a third-party or non-cleint. ***Banc One Capital Partners Corp. V. Kneipper,*** 67 F.3d 1187, 1198

(5th Cir. 1995)(citations omitted). For instance, an attorney who drafts a will or trust instrument does not owe any duty of care to persons who were specific, intended beneficiaries of the estate plan. ***Barcelo v. Elliott,*** 923 S.W. 2d 575, 577 (Tex. 1996). Moreover, an attorney-cleint relationship will not be readily imputed absent sufficient showing of intent. ***Kneipper*** at 1198. Even if an attorney is especially helpful and freely gives advice to others, the fact that such orders may have subjectively relied on the attorney without anything more in insufficient to create a fiduciaty relationship. ***Castillo*** at 958. Thus, the provision in question in the Liquidating Trust Agreement, when considered in the context of the finding in the Court's Memorandum Opinion, demonstrates no intent to create a fiduciary relationship between non-signatories to the Liquidating Trust Agreement.

Husjord / Byrd apparently attempt to assert the Kleberg & Head owes a contractual obligation to them as intended third-party beneficiaries of the Liquidating Trust Agreement, as opposed to a fiduciary obligation, in order to

avoid the problem of no legal duty. Kleberg & Head still does not owe any enforceable obligation to any other creditors. A third-party beneficiary may not recover under a theory of contractual liability from an attorney based upon that attorney's contract to provide legal services for another client. ***Castillo*** at 960-961.

Neither Husjord / Byrd nor Kleberg & Head are themselved party to the Liquidating Trust Agreement. The privity barrier, thus, applies in wither sense. Kleberg & Head, therefore, had no duty to the other creditors to protect the other creditors' interest because Kleberg & Head had no attorney-client relationship, or other fiduciary relationship, and no contractual relationship with the other creditors by virtue of the provision for removal of the trustee.

Additionally, each of the other creditors was represented by its own counsel, including Husjord / Byrd. Tor Shippping A.S., for instance, was represented by its own attorney of record, Robert W. Woolsey, a specialist in admiralty and maritime law. At one time in the

proceedings, Tor Husjord Shipping A.S., was represented by Percy L. "Wayne" Isgitt as attorney of record, a specialist in bankruptcy law, according to Plaintiffs' motion. Tor Husjord Shipping A.S., also was represented by its present attorney of record, Erling R. Krosby. Memories, Inc., Majestic, Ltd., and Marcus Byrd were represented by their own attorney of record, Robert W. Woolsey, who counsel against removal of the liquidating trustee because no only Kleberg & Head but the majority of the other creditors did not support such action. Erling R. Krosby by his earlier correspondence to the other attorneys did not himself demand removal of the liquidating Trustee, but rather he proposed an administrative oversight committee to monitor and guide the Liquidating Trustee's actions. Tor Husjord Shipping A.S.'s own bankruptcy attorney, Mr. Isgitt, rather than petitioning the Court for removal of the trustee or to amend or modify the plan to allow for such dependent administration of the trust, chose instead to sile a motion for relief of stay. One may reasonable assume it was the consensus opinion that

removal of the trustee or amendment of the trust at that date would only have caused considerably more expense and delay and duplication of effort. Husjord / Byrd's interpretation of Kleberg & Head's non-use of its removal authority not only is contrary to the law of the case but also is against common sense.

Finally, the inaction of Kleberg & Head to remove the trustee, claimed by Husjord / Byrd to constitute a breach of duty, occurred more than two years prior to filing the present adversary action on May 4, 1997. Husjord / Byrd were parties to the prior proceedings, represented by attorneys of record and other counsel, and actually aware of Kleberg & Head's refusal to remove the trustee as of at least March 17, 1994. In Texass, a legal malpractice action sounds in tort and is governed by negligence principles. ***Barcelo*** at 579. A tort is a trespass governed by a two-year limitations period. ***Castillo*** at 962. Hujord/Byrd's claim, therefore, accrued at the latest on March 17, 1994, and was barred by limitations of March 17, 1996.

CONCLUSION

For the reasons stated above, the court finds that there are no genuine issues of material fact and Kleberg & Head are entitled to judgment in their favor as a matter of law.

It is therefore ORDERED that Kleberg & Head, P.C.'s motion for Partial Summary judgment Adjudication is hereby GRANTED, and judgment is rendered against Plaitiffs who shall take nothing by way of their complaint against Kleberg & Head, P.C.

DATED this 19 day of May, 1999.

RICHARD S. SCHMIDT
Chief Bankruptcy Judge
United States Bankruptcy Judge

United States District Court
Southern District of Texas
ENTERED
March 19, 1999
Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE: CASE NO. 91-26594-11
BURTON SECURITIES, INC. CHAPTER 11

TOR HUSJORD SHIPPING A.S.,
ET AL.
Plaintiffs
VS. ADVERSARY No. 97-2171-B
HARRELL Z. BROWING, ET AL.
Defendants

ORDER GRANTING CONTINENTAL INSURANCE COMPANY'S RULE 7012(b0 MOTION TO DISMISS COMPLAINT

On this day came on for consideration the Motion to Dismiss filed by Continental Insurance Company ("Continental"), Defendant. The Court, having heard the evidence and arguments of counsel, finds that the Motion to Dismiss should be granted for the following reasons;

1. First, the Complaint should be dismissed because summary judgment was granted by this Court in favor of Harrell Z. Browning.

2. Second, the Complaint should be dismissed because at all material times, Mr. Browning has absolute derived judical immunity because at all material time he acted pursuant to this Court's orders where he sought and obtained judicial approval of his actions. *See* ***Boullion v. McClanahan,*** 639 F.2d 213 (5th Cir. 1981), where the Fifth Circuit held that a bankruptcy trustee is clothed with absolute immunity for tort actions where he acted pursuant

to bankruptcy court approval and the remedy for erroneous or wrongful action was appellate review. Plaintiffs had notice of all of the material actions by Mr. Browning and the hearings in this case, appeared at the significant hearings by and through their counsel, and one of their attorneys, Robert Woolsey, acted as special counsel for the trustee.

3. Third, the Complaint fails to state a claim upon which relief can be based because Plaintiffs seek to establish upon Continental, a commercial surety, pursuant to Article 21.21 Texas Insurance Code. The Supreme Court of Texas has held that Article 21.21 of the Texas Insurance Code is inapplicable to a commercial surety. ***See Great American Insurance Company v. North Austin Municipal Utility District,*** 908 S.W. 2d 415, (Tex. 1995).

4. Fourth, the Complaint fails to state a claim upon which relief can be based for any action or inaction of Mr. Browning which occurred more than two years prior to the filing of this suit on May 30, 1997. The actions Plaintiffs complain of against Mr. Browning, the principal

on the bond, are all tort actions which are barred by the applicable statue of limitations for any action or inaction occurring more than two years prior to the filing of the law suit.

5. Fifth, the Complaint should be dismissed because it fails to state a claim upon which relief may be based against Continental for any amounts in excess of $161,000.00, the stated amount of the Bond. As a matter of law, Continental can not be liable for any amount in excess of that amount.

6. Sixth, the Complaint should be dismissed because the Plaintiffs have no standing to bring this action and there is no privity of contract. Mr. Browning acts as a contract trustee (and not a fiduciary) of assets pursuant to a confirmed plan of reorganization in his capacity as a contract trustee between the debtor, Burton Securities and Mr. Browning. No leave of court has been sought by the Plaintiffs to bring this action and this Court has not granted Plaintiffs permission to file this suit. The contract is entitled "Burton Securities, S.A., Liquidating Trust

Agreement" (the "Agreement") a true and correct copy of which was attached to the Complaint. There is no privity of contract between the Plaintiffs and Mr. Browning or between the Plaintiffs and Continental and this Court has not entered any order permitting Plaintiffs to bring this action. Only Burton Securities has standing to bring this suit. The Agreement provides that "This is a liquidating trust and the Liquidating Agent shall be a contract Liquidating Agent and not be a fiduciary. This Agreement and the Trust created herein shall no be subject to the Texas Trust Code or the common law applicable to trusts. The Agreement requires Mr. Browning as Liquidating Trustee to sell all of the trust property and further provides that "All sale of Trust Property shall be conducted in the Liquidating Trustee's sole discretion and the Trust property shall not be charged and the Liquidating Trustee shall not be liable for the exercise of this discretion unless it has been found guilty of willful misconduct, bad faith, or gross negligence shown by clear and convincing evidence." The Agreement further provides that "The Liquidating Trustee shall not be

liable nor shall there be made any assessment or charge upon him or the Trust Property for any breach in any obligation in carrying out his duties in the Creditor Plan, unless the Liquidating Trustee is found guilty of willful misconduct, bad faith or gross negligence as shown by clear and convincing evidence." The Agreement further provided that the law firm of Kleberg & Head, P.C. could remove or replace the Liquidating Trustee, with or without cause. Accordingly, the agreement was a contract between the Debtor and Mr. Browning.

7. Seventh, the Agreement also gave the creditors ("Plan Creditors") the opportunity to request this Court's approval for any ct, so if any Plan Creditor did not like the actions taken or not taken by Mr. Browning, their remedy was to request this Court's direction as a contested matter. To the contrary, Plaintiffs, through their counsel, had notice of and appeared at all material hearings concerning the Liquidating Trustee's actions, and failed to raise any objection thereto or appeal therefrom. Having so failed to act, the Plan Creditors are now estopped to

complain of any such action and the matters complained of are now *res judicata.*

It is therefore ORDERED that the Plaintiffs' Second Amended Complaint as to Defendant, Continental Insurance Company, be and it is hereby dismissed with prejudice.

Signed this 19 day of May, 1999.

RICHARD S. SCHMIDT
Chief Judge
United States Bankruptcy Judge

United States Bankruptcy Court

For the Southern District of Texas

In re Burton securities, S.A.

*Debtor**

BOND AND ORDER APPROVING BOND OF TRUSTEE

We, Harrell Z. Browning

Of** Corpus Christi, TX

Principal, and The Continental Insurance Company

Of** New York, NY

Surety, bind ourselves to the United States in the sum of 161,000.00 for the faithful performance by the undersigned principal of his official duties as trustee of the state of the above-named debtor.

Dated: November 30, 1992

Harrell Z. Browning

_____

Eloise B. Weston – Attorney – in – fact

The bond filed by Harrell Z. Browning of Corpus Christi, Texas as trustee of the estate of the above-named debtor is hereby approved.

The Vessel	$2,500,000.00
Cash bank in casino	8,750.00
Texas Commerce Bank account	118,215.39
Casino and other equipment	85,000.00
Land	
Ouachita Parish, Louisiana	115,000.00
Champagne County, Illinois	230,000.00
Natchitoches Parish, Louisiana	525,000.00
Orleans Parish, Louisiana	100,000.00
Morehouse Parish, Louisiana	400,000.00
Clayton County, Georgia	300,000.00
	$4,381,965.39

added by Erling Krosby

Harrell Z. Browning

Lawyer

The 600 building, Suite 2020

600 Leopard Street

Corpus Christi, Texas 78473

(512) 883-1940

E-mail:hzbrowning@aol.com Tax I.D. Number 449-52-3256

May 23, 1995

Burton Securities S.A.

C/o Harrell Z. Browning

600 Leopard Street

Corpus Christi, Texas 78473

Description of Services

12/15/92 Office conference with Dr. Camafsos regarding plans for sale of properties; telephone conference with Johnny Johnson regarding whereabouts of the Dr. and regarding meeting for week after next; 2.25 393.75

12/29/92 Trip to Nachitoches Louisiana to view Burger King property and in route to visit with Johnny Johnson. 9.00 1,575.00

12/30/92 Continue to Monroe Louisiana and conference with Johnson; view some of properties; discussion of possible ways of marketing properties; discussion of the Burger King offer on the Illinois property and proceed to New Orleans for examination of the

Popeye's property. 12.00 2,100.00

1/6/93 Telephone conference with Johnson regarding possible sale of all properties; FAX to Johnson. 0.25 43.75

3/3/93 Telephone conference with Johnson on Burton rent check; telephone conference with Mississippi lawyer regarding sale price of the assets. 0.67 116.67

4/5/93 Telephone conference with Johnson regarding meeting this week. 0.33 58.33

4/6/93 Telephone conference with Johnson – will be down Thursday; telephone conference with Captain regarding wind from South bothering the moorings; telephone

conference to Bill Campbell regarding offer on boar; telephone conference with marcus Boyds office regarding purchaser; telephone conference with Woolsey regarding purcharer for land and boat.

2.25 393.75

4/8/93 Office conference with Johnson regarding sale to a prospect which he presented.

2.50 437.50

4/10/93 Telephone conference with Johsnon regarding the offer to buy all the real estate other than Rantoul for the net cash amount to the estate of $500,000 plus the purchaser pay all closing costs by July1, 1993.

1.00 175.00

1/6/94	Telephone conference with lawyer for Louisnan Trust Company (purchaser of real estate)	0.70	122.50
2/7/94	Telephone conference with Charles Ryan of Monroe, Louisiana. Discussion of the closing documents on the Real Estate; trip to Jim McMillan's office regarding same, telephone conference with Fowlkes regarding meeting for tomorrow and return office.	2.80	490.00
3/2/94	Telephone conference with George Constant, 713-974-2206, wanting to buy the real estate-not-boat- Comatsus is a friend of his and he wants to buy the boat; advised him that the Dr. should make a cash offer.	0.50	87.50

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

IN RE:

BURTON SECURITIES, INC.

TOR HUSJORD SHIPPING A.S.

ET. AL.

Plaintiffs

VS. ADVERSARY NO. 97-2171-B

HARRELL Z. BROWNING

ET. AL.

Defendants

ORDER GRANTING MOTION TO STRIKE

SUPPLEMENT TO PLAINTIFFS' RESPONSE TO

AMENDED MOTION FOR SUMMARY JUDGMENT

On this day come on for consideration the Motion to Strike Supplement to Plaintiff's response to Amended Motion for Summary Judgment by defendant Browning and Plaintiffs' Motion for Summary judgment, filed by Defendant Harrell Browning ("Browning"). The Court finds that Plaintiffs' Supplement (Docket #136) was filed after the October 2, 1998, deadline imposed by this Court and without additional leave of Court and therefore should be stricken.

It is therefore, ORDERED, that the Motion to Strike is hereby GRANTED, and Plaintiffs' Supplement to Response to Amended Motion for Summary Judgment by Defendant Browning is hereby STRICKEN.

Signed this 19 day of May, 1999.

_____

RICHARD S SCHMIDT

Chief Judge

United States Bankruptcy Judge

THE COURT: Do I have authority to make–to enter sanctions?

MR. JORDAN: You certainly do. I mean,the answer to that question--

THE COURT: For failure to appear?

MR. JORDAN: There would be one thing I'd like to--I think you do, Judge. In fact, I've practiced under the assumption that you did with my appearance. And I can't imagine that the Court would not. It is important to my client, as any factor in this case--

THE COURT: Is getting it over with.

24| MR. JORDAN: -- is to get is concluded.

25| THE COURT: Well, what will get it over with though?

1| That's my concern.

questions but I think that's very clear and I have no new authority and would defer to Mr. Rosenstein's two new cases.

The only other thing that I think would be helpful, simply because I don't think there's any way to do.

anything that would prevent further appeal, in the event that

Mr. Krosby does that. And I suspect he will. So, the only

thing I would ask is that –

MR. JORDAN: I guess actually it's the *pro hac vice* based on the --

THE COURT: And that's what keeps him going.

MR. JORDAN: Well, U think tht the only thing that keeps him going inthis court is your tolerance in allowing that *pro hac vice* order to stand. Because it's certainly an interlocutory order that's subject to the jurisdiction of this court.

MR. JORDAN: Can I make that observation simply in this respect. If there is another lawyer in this country that would pick this file up and adopt these pleadings, and then if –

THE COURT: yes. The most wonderful thing that could happen in behalf of the appellees is that I revoke his *pro hac vice* *vice* in a long laborious situation. I will notify the Fifth Circuit. I will notify the chief judge of the Southern District

about what has occurred here. But to revoke his *pro hac vice*, give the clients another 30 days to get another lawyer. I could do all that and then a lawyer would come in probably that does this kind law and look through this and think, oh, my goodness.

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

TOR HUSJORD SHIPPING A.S.

ET. AL.

Plaintiffs

CIVIL ACTION NO. 99-00448

VS. (formerly ADVERARY NO. 97-2171-C

HARRELL Z. BROWNING,ET AL

Defendants

NOTICE OF APPEAL

TO

COURT OF APPEALS

TO: THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

Notice is hereby given that Erling R. Krosby, attorney for Appellants in the above named case, appeals to the United States Court of Appeals for the Fifth Circuit from Findings of Fact and Conclusion of Law and Final Judgment both entered on may 1, 2000 on the Docket of the United States District Court, Southern District of Texas.

Respectfully submitted

Erling R. Krosby

Appearing Pro Se

2243 Foreland Drive

Houston, Texas 77077

(281) 497-2203

Fax: (281) 531-0039

UNITED STATES DISTRICT COURT

SOUTHERN DISTRTIC OF TEXAS

OFFICE OF THE CLERK

MAY 24, 2000.

Michael N. Milby, Clerk— 521 Starr St.

Corpus Christi, Tx

512/888-3142

Mr. Charles R,. Fulbridge III, Clerk

U.S. Court of Appeals – Fifth Circuit

Room 102, 600 Camp Street

New Orleans, Louisiana 70130

Re: Case No.C.A. C-99-448

Tor Husjord Shipping A.S., Et Al

Vs.

Harrell Z. Browning, Et All

Dear Sir:

In connection with the above appeal, the following dcuments are hereby transmitted:

XX Certified copy of notice of appeal and docket entries (Notice of Appeal was filed: 5/24/00) by Erling R. Krosby, atty for appellants Tor Husjord Shipping (appealing Doc. #105 Findings of Fact & Conclusions of Law filed 4/28/00

In regard to the notice of appeal, the following information in furnished:

XX The Court of Appeals docket fee HAS NOT been paid.

XX District Judge entering the final judgement is the Honorable Janis Graham Jack

Respectfully,

_____

Deputy Clerk

Enc.

Cc: all partied

(Dkt 13 form included in copy to Atty. Krosby/mas)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document; Notice of Appeal to Court of Appeals was served via first class mail upon the persons listed below, on this 29th day of May, 2000.

Shelby A. Jordan
500 North Water Street, Suite 900
Corpus Christi, Texas 78471

L. Nelson Hall
Dun & Weatherhed
611 S. Upper Broadway
Corpus Christi, Texas 78401

Matthew A. Rosenstein
711 North Carancahua, Suite 420
Corpus Christi, Texas 78475

_____
Erling R. Krosby

MINUTES

Special Shareholders Meeting was conducted on Tor Husjord Shipping A/S' premises on September 14, 1993, 11.05 a.m.

Present were:

Name.	Number of shares.
Tor Husjord	10.671 shares
Asbjorn Hermansen	1,240 "
Trond Husjord	4,290 "
Victor Grenersen	590 "
Ann Helen Husjord	900 "
Martin Tjaerandsen	300 "
Kjell Lauransen	750 "
Oystein Jansen	150 "

After registration the following was handled pursuant to the agenda;

1. the Special Shareholders Meeting's agenda and notice were approved.

2. Martin Tjaerandsen was elected the manager of the meeting.

3. Viktor Grenersen and Asbjorn Hermansen were elected to sign the Minutes.

4. the president informed about the actions that were taken in order to reconstruct the company. The company conducts negotiations with Tor Husjord Management A/S to take over the assets and liabilities of the company. The determination of values was made in close cooperation with the auditor, and this work is continuing.

5. The president informed about the proposal to change the name of the company due to possible confusion with Tor Husjord Management A/S. The Shareholders meeting discussed the proposal of the Board of Directors and

recommended the following change in name to Tempo A/S, alternatively Tempo Services A/S. The Shareholders Meeting approved the following change: Tor Husjord Shipping A/S changes it name to Tempo A/S, alternatively to Tempo Services A/S.

no more was to be handled and the Special Shareholders Meeting was adjourned at 11:20 a.m.

Victor Grenersen

Signed

Correct copy bronnoysundregisters.

07.03.2000

Sign: Initial

I, Erling R. Krosby, hereby confirm

That the above translation from Norwegian Trade Council into English is correct.

Date: March 8, 2000

Erling R. Krosby

Attorney at Law

Licensed in Norway and Pennsylvania

The Royal Norwegian consulate general in Houston, Texas hereby confirms that the above is an unofficial translation of a copy of a Norwegian document and that it to the best of the consulate General's knowledge represents an correct translation into English.

Royal Norwegian Consulate, Houston, Texas

March 8, 2000.

Mona Svendsen

Vice Consul

Leg. No: 33/00

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

TOR HUSJORD SHIPPING A.S.

INDIVIDUALLY AND IN THE

NAME OF THE UNITED STATES

Plaintiffs

C. A. NO. c-99-00448

ON APPEAL FROM THE

BANKRUPTCY COURT

V.

HARRELL Z. BROWNING, KLEBERG & HEAD

AND CONTINENTAL INSURANCE COMPANY

Appellees

AFFIDAVIT OF TOR HUSJORD

STATE OF NORWAY.

BEFORE ME, the undersigned official, on this day appeared Tor Husjord, and first being duly sworn according tyo law upon oath deposed and said;

1. My name is Tor Husjord. I am over 18 years of age and my address is Administrasjons veien 1, 8501 Narvik, Norway. I am of sound mind and I am fully competent to make this Affidavit. I have personal knowledge of facts stated herein, and they are all true and correct, except as to matters therein stated to be alleged on information and belief and as to those matters I believe it to be tru. This Affidavit may be regarded as a substitute for any testimony I may be required to give in the above styled case regarding this Court's Sua Sponte Order to Show Cause Pursuant to Rule 17(a).

I.

THE ISSUE OF THE REAL PARTY IN INTEREST AND MY INVOLVEMENT IN THIS CASE.

2. I would respectfully allege that the above referenced Order is based on wrong information.

I have been the president of Tor Husjord Shipping A/S since it was established in 1987. In Sugust 1989 as president of this company I initiated Tor Husjord Shipping A/S' lawsuit against Debtor Burton Securities in the United States District Court, Brownsville Sivision in order to establish and enforce its maritime lien on the vessel. Therefore, for ten years I have personally been responsible for the authorization and instructions to this company's attorneys Robert W. Woolsey and Erling R. Krosby to aggressively continue their efforts to seek justice in these proceedings.

In 1989 there was no uncertainty about who the correct party to the lawsuit was, because the basis for the lawsuit was breach of an agreement between Tor Husjord Shipping A/S and Burton securities. As president of Tor Husjord Ahipping A/S I had numerous telephone conversations with Mr. Woolsey and Mr. Krosby.

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

IN RE BURTON SECURITIES, INC.

CASE NO. 91-26594-11

CHAPTER 11

TOR HUSJORD SHIPPING A.S.

ET. AL.

Plaintiffs

VS. ADVERARY NO. 97-2171-B

HARRELL Z. BROWNING,ET AL

Defendants

MOTION TO BRING IN ADDITIONAL PLAINTIFFS AND DEFENDANT, FOR JOINDER OF PROCEEDINGS ON TRUSTEE'S BOND AND TO AMEND COMPLAINT TO CONFORM EVIDENCE

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE

COME NOW Plaintiffs, Tor Husjord Shipping A.S., Memories, Inc. / Marcus Byrd and Majestic, Inc. / Marcus Byrd, hereinafter referred to as Plaintiffs, and move this Honorable Court to grant this Motion to Bring in Additional Plaintiffs and Defendant, for Joinder of Proceedings on Trustee's Bond and to Amend Complaint to Conform to Evidence, and as grounds in support of this, state to the Court as follows:

3. Amendment of Complaint to Conform Evidence

1. As a part of the initial discovery proceeding Plaintiffs requested a Transcript of Hearing on Motion to Sell on September 13, 1993. This transcript is attached as

Exhibit 1 to Plaintiffs; Response to Motion for Partial Summary Judgment by Defendant Harrell Z. Browning and is included herein by reference. This is newly discovered evidence in which

(a). This Court set forth the following criteria for sales to a purchaser of the assets of the estate: (1) most possible money for the asset, (2) purchaser has the necessary recources in the bank, (3) a competitive bid must be more than $100,000 higher than a bid on the table, (4) the case is old and the boat has been sitting in the dock for a longtime, i.e. must be sold as soon as possible, (5) must have inspected whether or not the purchaser can afford to pay the purchase price, (6) most usual terms are cash, may be subject to assumed liens on the property, closing within 20 days and if the terms are equal, the bid goes to highest bidder.

(b) The competitive bidder to the bid of Siena, Leisure Time Casinos, testified that it was a public corporation operating in the gambling business with four

ships presently on the Great Lakes, with the necessary resources to which they would testify before the court and submitted a bid that was $200,000 higher than Siena's bid pursuant to an already signed contract.

(c) The major concern of the creditors was to get paid.

(d) The property description and other documents regarding the real estate was not available, even after and hour's time to find somebody that has that description and Leisure Time Casinos wanted to know what they were buying.,

(e) This Court asked whether or not there was the same dililgence period to escape from the contract for both Siena's and Leisure Time Casinos bid and

(f) Defendant Browning denied this by confirming that the time of the diligence period was past for "the other one" i.e. Siena's bid, but not for Leisure Time Casinos. This mislead this Court to deny approval of Leisure Time Casinos' $200,000 higher bid because it

thought that it would cause a delay of 20 days if Leisure Time Casinos go the bid, but not for the Siena bid. None of the creditors had the signed agreement at theat time and could check the contract with Siena. When Plaintiffs obtained the written contract and compared it with the statements in this Court, it showed that Siena pursuant to the contract had the same diligence perios of twenty days after the approval of this Court as Leisure Time Casinos. This misrepresentation to this Court had the consequence that the bid of a qualified buyer experienced in gambing ships and gambling which testified that it had the necessary resources to buy the ship, was denied even though its bid was $200,000 higher because this Court received wrong information from Defendant Browning. When Siena walked out of the contract this estate lost approximately $2,000,000 caused by Defendant Browning's misrepresentation.

(g) Defendant Browning misrepresented to this Court that the Siena deal could be closed immediately

while the truth of the matter was that Defendant Browning did not have the documents ready until November 15, 1993.

II. As a part of the initial discovery proceedings Plaintiffs obtained a letter to Browning from a surveyor stating that the vessel was very difficult to sell, that it was a risk that it would only sell for scrap value of only $250,000 and that is was possible to sell it by auction if it was widely advertised and professionally sold. This proves knowledge on the part of Defendant Browning that he had to sell the vessel quickly as knowledge on the part of Defendant Browning that he had to sell the vessel quickly as normally done by the trustees in bankruptcy, for cash, to a bidder which could prove it had the resources in the bank, "as is" with closing immediately without escape clauses with all necessary documents ready at the time of the sale and not complicate selling of the estate en bloc with all the problems of title and mortgages of many pieces of real estate and escape clauses.

Plaintiffs respectfully request that this Court approves amendment of the Complaint to conform to evidence pursuant to Rule 15(b) of Federal Rules of Civil Procedure.

BANKRUPTCY CODE

§ 322. Qualification of trustee

(d) A proceeding on a trustee's bond may not be commenced after two years after the date on which such trustee was discharged.

BANKRUPTCY RULE 2010

QUALIFICATION BY TRUSTEE; PROCEEDING ON BOND

(a) Blanket Bond. The United States trustee may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by the trustee or trustees to cover (1) a person who qualifies as trustee in a number of cases, and (2) a number of trustees each of whom qualifies in a different case

(b) Proceeding on the Bond. A proceeding on the trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.

28 U.S.C. 455.(a)(b)(1)

§455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party; or a personal knowledge of disputed evidentiary facts concerning the proceeding;

28 U.S.C. 372 (c)(1)

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditions administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefore, identify a complaint, for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of it that of the chief judge, to

that circuit judge in regular active service next senior in date of commission (hereafter, for purpose of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

28 U.S.C. 157 (d)

(d) The district court may withdraw in whole or in part, any case or proceeding referred under this section, on its own motion ot on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of bth title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the

jury trail if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

18 U.S.C. 154

§ 154. Adverse interest and conduct of officers

A person who, being a custodian, trustee, marshal, or other officer of the court

(1) knowingly purchases, directly or indirectly, any property of the estate of which the person is such an officer in a case under title 11;

(2) knowingly refuses to permit a reasonable opportunity for the inspection by parties in interest of the documents and accounts, relating to the affairs of estates in the person's charge by parties when directed by the court to do so; or

(3) Knowingly refuses to permit a reasonable opportunity for the inspection by the United States Trustee of the documents and accounts relating to the affairs of an estate in the person's charge,

shall be fined under this title and shall forfeit the person's office, which shall thereupon become vacant.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(c) Motion and Proceeding Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 15. Amended and Supplement Pleadings.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that

the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

18 U.S.C. 3057

§ 3057. Bankruptcy investigations

(a) Any judge, receiver, or trustee having reasonable grounds for believing that any violation under Chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been

committed. Where on of such officers has made such report, the others need not do so.

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any such offense has been committed shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice so not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

FILED

MAY 30 1997

MICHAEL N. MILBY, CLERK OF COURT

UNITED STATES DISTRICT COURT	SOUTHERN DISTRICT OF TEXAS

MOTION & ORDER

FOR ADMISSION *PRO HAC VICE*

Division	Brownsville	Action Number	
Tor Husjord Shipping A.S., Memories Inc. / Marcus Byrd and Majestic Ltd./Marcus Byrd			
Versus			
Harrell Z. Browning and Kelberg & Head P.C.			

This lawyer, who is admitted either to the State Bar of Texas or to another federal district court:

Name	Erling R. Kosby
Firm	2243 Foreland Drive
City & Zip Code	Houston, Texas 77077
Telephone	Phone: 281 497 2203
Licensed: State & Number	PENNSYLVANIA Bar No. 60508
Admitted US District Court for	Admitted to: United States District Court for the Eastern District of Pennsylvania

Seeks to appear as the attorney for this pary:

Tor Husjord Shipping A.S., Memories Inc. / Marcus Byrd and Majestic Ltd./Marcus Byrd	
Dated: 5/29-1197	Signed:

ORDER

This lawyer is admitted *pro hac vice.*

Signed on June 12, 1997. United States District Judge

Each sale act of mine in administration of this estate was approved by an order of the Bankruptcy Court, entered upon notice to all creditors including Plaintiffs. Although Plaintiffs received actual notice of each and every hearing, Plaintiffs filed no pleadings objecting to the actions sought to be approved by me through Bankruptcy Court orders.

Supreme Court, U.S.
FILED
JUN 6
CLERK

No. 00-1783

In The

Supreme Court of the United States

ERLING R. KROSBY,

Petitioner,

vs.

HARRELL Z. BROWNING, THE CONTINENTAL INSURANCE COMPANY, KLEBERG & HEAD, SHELBY A. JORDAN & MATTHEW A. ROSENSTEIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Shelby A. Jordan
and Continental Insurance
Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondents submit that the only issues for which Petitioner has standing are as follows:

1. Did the District Court err in ordering sanctions against Petitioner, including withdrawing his permission to practice *pro hac vice*?

2. Did the Fifth Circuit err in granting Respondents' original and renewed Motions to Dismiss the Appeal, in part, under Rules 3(a)(2) & 6(b)(2)(B), Federal Rules of Appellate Procedure for Petitioner's failure to timely provide "a statement of issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk"?

3. Did the Fifth Circuit err in granting Respondents' motion to strike Petitioner's statement of issues filed late and without leave of court, comprising 16 pages containing 52 issues, which were disjointed ramblings that are difficult, if not impossible to follow?

PARTIES TO THE PROCEEDING

The Parties to the proceeding in the United States Court of Appeals for the Fifth Circuit are as follows:

Erling R. Krosby, Petitioner, acting *pro se;*
Attorney for the Plaintiffs below;

Tor Husjord Shipping, A/S, Erling R. Krosby's client and not a party to the Petition for Certiorari;

Harrell Z. Browning, Respondent;

The Continental Insurance Company, Respondent;

Kleberg & Head, P.C., Respondent;

Shelby A. Jordan, Respondent and Attorney for Harrell Z. Browning and Continental Insurance Company in the United States Court of Appeals for the Fifth Circuit and for Mr. Browning only in the Bankruptcy Court; and

Matthew A. Rosenstein, Respondent and Attorney for Continental Insurance Company only in the Bankruptcy Court, the District Court and the Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Continental Insurance Company is a wholly owned subsidiary of CNA Financial Corporation, a publicly traded corporation. Approximately 85% of the stock of CNA Financial Corporation is owned by Loews Corporation.

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COUNTERSTATEMENT OF THE CASE

Respondents disagree with Petitioner's version of the facts and state the following in order to present accurately what transpired in the Courts below.

Petitioner, Erling Krosby, was not a plaintiff, below, but the attorney for three plaintiffs: (1) a foreign Norwegian corporation, Tor Husjord Shipping, A/S ["THS"]; (2) A.S. Memories, Inc./Marcus Byrd; and (3) Majestic, Ltd., in an unsuccessful adversary proceeding filed in the United States Bankruptcy Court for the Southern District of Texas against a liquidating chapter 11 trustee, Harrell Z. Browning; his bonding company, Continental Insurance Company; and a law firm, Kleberg & Head. Shelby Jordan has represented Mr. Browning at all times and Continental on appeal to the Fifth Circuit. Matthew A. Rosenstein represented Continental in the Bankruptcy Court and on appeal to the District Court. Petitioner is not licensed to practice before the United States District Court for the Southern District of Texas, but was admitted to practice *pro hac vice.*

During the course of the adversary proceeding in the bankruptcy court, the Plaintiffs filed an unsuccessful civil contempt motion against all the Defendants and two of their respective attorneys, Respondents Jordan and Rosenstein. After the bankruptcy court granted summary judgments in favor of Respondents Browning and Kleberg & Head, P.C. [Petitioner's Appendix, P. 70 & 101], and granted Respondent Continental's motion to dismiss for failure to state a claim [Petitioner's Appendix, P. 117], the plaintiffs filed, with Petitioner as their attorney, an unsuccessful motion to recuse the bankruptcy judge and

a petition for writ of mandamus against the bankruptcy judge, which latter petition they later withdrew. The bankruptcy judge denied the recusal motion on procedural grounds. The Plaintiffs then unsuccessfully appealed to the District Court.

A.S. Memories, Inc./Marcus Byrd and Majestic, Ltd. subsequently dismissed their appeal after the District Court entered its *Sua Sponte* Order for Attorney to Show Authority to Represent Client [Tr. No. 56, January 24, 2000]. In that Order, the District Court ordered the Plaintiffs and Tor Husjord individually to appear and further Ordered the Plaintiffs' attorney [Petitioner] to appear and show that he possesses continuing authority to represent his clients. THS continued the prosecution and the appeals to the Fifth Circuit. However, THS has not timely filed a Petition for Certiorari in this Court and no Petition for THS is presently pending.

The District Court subsequently withdrew the reference to the Bankruptcy Court; adopted the Bankruptcy Court's findings of fact and conclusions of law and issued its own findings of fact and conclusions of law, consisting of 34 pages in which the Court detailed the facts of the case and the numerous misrepresentations and violations of Rule 11, F.R.C.P. by Petitioner. [Petitioner's Appendix, P. 6]

According to the District Court's Findings of Fact and Conclusions of Law [Petitioner's Appendix, P. 6], these violations consisted, in part, of frivolous pleadings [P. 18]; filing of 3 amended complaints in bad faith without leave of court for the purpose of harassing Defendants in an attempt to obtain a settlement for Plaintiff,

and were filed without first conducting a reasonable inquiry into the facts of this case or the applicable law [P. 20]; misrepresentation of facts [Pp. 26 & 23]; that Petitioner and his client "continued a frivolous and harassing course of conduct" by their allegations [P. 28]; that Petitioner misrepresented the real party in interest [P. 33]; that "[T]he record demonstrates that Krosby was willing to tell the Court anything to justify Mr. Husjord's failure to appear. Krosby misrepresented his client's location, status, and health condition to avoid the necessity for his appearance" [P. 38]; that Petitioner made misreprentations in his *Pro Hac Vice Motion* [P. 44]; that Petitioner "continued to pursue his frivolous, non-meritorious, and vexatious course of conduct" [P. 40]; that "The Court is led to believe that Krosby may be a 'rogue', acting without any client authority, pursuing a cause of action which has no merit" [P. 47]; that "The allegations in pleadings signed by Krosby and in Krosby's oral representations lacked evidentiary support" [P. 50]; that "Krosby demonstrated his propensity to change the facts or his theories of recovery when errors were pointed out" [P. 35]; "The excuses given by Mr. Krosby for Mr. Husjord's failure to appear were disingenuous at best, morphing from health problems to business problems and back again at each hearing" [P. 56]; "As further example of the frivolous actions and pleadings, Krosby alleged in letters to Continental that the surety bond was invalid, but later filed suit on the same surety bond. Krosby made written demand for a settlement conference and threatened to file suit, seek contempt, and pursue criminal action if Continental did not oblige. Krosby, further alleged that the bankruptcy court had jurisdiction over Continental pursuant to Rule 9025, F.R.B.P., but later asserted in various

pleadings that the bankruptcy court did not have jurisdiction." [P. 28]; "Krosby and his client continued a frivolous and harassing course of conduct by alleging that all defendants and their counsel committed either criminal acts or improper conduct subject to sanctions." [P. 28]; " Krosby's course of conduct as outlined above demonstrates his violation of the Federal Rules of Civil Procedure and of Orders of the Court, his disregard for the Rules of Professional Conduct, and his headlong pursuit of a frivolous lawsuit. For these reasons, the Order Admitting Erling R. Krosby *Pro Hac Vice* should be vacated instanter and his admission to appear in this case revoked." [P. 50]

The District Court entered two separate judgments: (1) permanently enjoining THS and Petitioner, Krosby, who agreed to the injunction in open court, from filing any further action against any of the Defendants or their respective attorneys relating to the subject of the case without first seeking and obtaining permission of the District Court; and (2) dismissing the case for want of prosecution for failure to prosecute and as a sanction for failure to comply with the Federal Rules of Civil Procedure. The attempted appeal of the permanent injunction was not perfected to the Fifth Circuit and the permanent injunction is now final and non-appealable and not reviewable by this Court.

In that Final Judgment [Petitioner's Appendix, P. 65], the District Court also denied the civil contempt motion and entered sanctions against THS and Petitioner, including withdrawing Petitioner's permission to practice *pro hac vice* and awarded sanctions against Petitioner as follows: attorneys fees for Continental Insurance in the

amount of $1,575.00 plus interest; for Harrell Z. Browning in the amount of $1,440.00 plus interest; for Kleberg & Head, P.C. in the amount of $3,995.66, plus interest; and for Matthew A. Rosenstein in the amount of $4,421.38; plus interest. The District Court also Ordered that the Order Admitting Erling R. Krosby *Pro Hac Vice* vacated and that his admission to appear in the case is revoked.

The Final Judgment also awarded monetary sanctions against THS in favor of Continental in the amount of $66,758.00, plus interest; reasonable attorneys in favor of Browning of $72,072.17, plus interest; and attorneys fees and expenses in favor of Kleberg & Head in the amount of $28,239.12.

The Fifth Circuit dismissed Petitioner's and THS's appeal on procedural grounds for failure to comply with basic Federal Rules of Appellate Procedure.

In the case below, the Petitioner relentlessly attacked all the parties and each of their respective attorneys, unsuccessfully sought recusal of the bankruptcy judge and unsuccessfully raised for the first time on appeal at the Fifth Circuit disciplinary action against both the district judge and the bankruptcy judge. [Petitioner's Appendix, P. 2]

Only Petitioner, Erling Krosby, has timely filed a Petition for Certiorari with this Court. The only Orders below for which Petitioner is entitled to file a Petition for Writ of Certiorari are the Orders in Case No. 00-40586 [Petitioner's Appendix, P. 2]: (1) granting the Motion of Harrell Z. Browning, Continental Insurance Co. & Matthew A. Rosenstein to dismiss appeal; (2) granting the Motion of Harrell Z. Browning, Matthew A. Rosenstein &

Continental to strike Appellant's statement of issues and (3) granting Appellees' renewed motion to dismiss appeal. The Fifth Circuit also denied Petitioner's Petition for Rehearing & Petition for Rehearing *En Banc* [Petitioner's Appendix, P. 4]. The remaining orders in that case relate to inappropriate motions raised for the first time on appeal at the Fifth Circuit and were appropriately denied.

REASONS FOR DENYING THE WRIT

The writ should be denied for five (5) reasons:

1. Question Nos. 13, 17 and 21, which relate to the District Court's sanctions against Petitioner, are issues which cannot be reached without overturning fact findings adverse to the Petitioner or causing the Supreme Court to become bogged down in complicated questions of fact.

2. There is no conflict among the Circuit Courts or the lower Courts.

3. The opinion below is unpublished.

4. Petitioner has no standing as to Question Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22 & 23.

5. The Fifth Circuit dismissed the appeal on procedural grounds without reaching the merits.

ARGUMENT IN OPPOSITION TO CERTIORARI

I. QUESTION NOS. 13, 17 AND 21, WHICH RELATE TO THE DISTRICT COURT'S SANCTIONS AGAINST PETITIONER, ARE ISSUES WHICH CANNOT BE REACHED WITHOUT OVERTURNING FACT FINDINGS ADVERSE TO THE PETITIONER OR CAUSING THE SUPREME COURT TO BECOME BOGGED DOWN IN COMPLICATED QUESTIONS OF FACT.

The District Court entered extensive Findings of Fact to support its Final Judgment for sanctions against Petitioner [Petitioner's Appendix, P. 6]. The District Court found, among other egregious conduct committed by Petitioner, that " . . . the Original, First, Second and Third Amended Complaints were filed in bad faith for the purpose of harassing Defendants in an attempt to obtain a settlement for Plaintiff, and were filed without first conducting a reasonable inquiry into the facts of this case or the applicable law. . . . The Original, First, Second and Third Amended complaints were signed by Krosby, and were used to pursue a course of conduct in which Defendants were forced to hire attorneys and participate in frivolous litigation." [Petitioner's Appendix, P. 20.] "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Rule 52(a), Federal Rules of Civil Procedure. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,*

333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This Court held in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 84 L.Ed.2d 518 (1985):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the [*574] district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982)."

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OR THE LOWER COURTS.

This case is fact specific as to Petitioner's sanctionable conduct in this case. The District Court properly applied Rule 11, Federal Rules of Civil Procedure, to enter appropriate sanctions. Petitioner fails to cite any contrary cases or authorities, let alone any other circuit court, involving Rule 11 sanctions under the same or similar facts. The Petition for Writ of Certiorari presents no novel issue and should be denied.

III. THE OPINION BELOW IS UNPUBLISHED.

The judgments and opinions below of the District Court and the United States Court of Appeals for the Fifth Circuit as to Petitioner are not published and are therefore not precedent. Likewise, there is no national importance to the decisions below.

IV. PETITIONER HAS NO STANDING AS TO QUESTION NOS. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22 & 23.

Petitioner has no individual standing and may not raise Question Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 22 & 23. These are Questions unique to his client that could only be raised only by Tor Husjord Shipping, A/S, not by Petitioner as Tor Husjord Shipping's attorney in his individual capacity. There is no pending Petition for Writ of Certiorari filed by Tor Husjord Shipping, A/S.

Petitioner initially filed a Petition for Writ of Certiorari with the Clerk of this Court on behalf of his client, as well as himself. The Petition was not accepted on behalf of Tor Husjord Shipping A/S because Petitioner is not licensed to practice before this Court. The Petition for Writ of Certiorari for Tor Husjord Shipping, A/S was never re-filed.

Shortly prior to filing the above Petition, Petitioner filed with the Clerk of this Court an application for admission to practice, which was denied because there remains a pending disciplinary proceeding against him before the Pennsylvania State Bar. Petitioner then filed a

motion before this Court for admission *pro hac vice*, which was also denied. Petitioner subsequently filed with the Clerk of this Court a second application for admission, which was also denied.

Now, Petitioner attempts to step into the shoes of his client, Tor Husjord Shipping, A/S, to raise for the first time in this Court on his own behalf his client's Questions as those of his own. However, those Questions are now *res judicata* as to Petitioner's client. Petitioner has no standing to raise these Questions. The Petition for Certiorari should be denied.

V. THE FIFTH CIRCUIT DISMISSED THE APPEAL ON PROCEDURAL GROUNDS WITHOUT REACHING THE MERITS.

Respondents' motion filed with the Fifth Circuit to dismiss the appeal on procedural grounds for failure to timely file a statement of issues was granted without opinion and without reaching the merits of the case. [Petitioner's Appendix, P. 2] The Fifth Circuit also granted Respondents' motion to strike Petitioner's late filed and confusing issues. [Petitioner's Appendix, P. 2] Petitioner fails to complain of the dismissal and the order striking his issues in any of the 23 Questions Presented in his Petition.

CONCLUSION

The District Court's Findings of Fact and Conclusions of Law demonstrates that the case below was totally devoid of merit. Summary judgment was granted against

Petitioner's client as to two of the Respondents and the case dismissed under Rule 7012, Rules of Bankruptcy Procedure as to Respondent Continental. Petitioner's conduct below was such that the District Judge withdrew the reference from the Bankruptcy Court; dismissed the case with prejudice; permanently enjoined Petitioner and his client from filing any further lawsuits against the Respondents without first obtaining the District Court's approval; ordered sanctions against Petitioner, to include withdrawing his permission to practice *pro hac vice* in the Southern District of Texas; and ordered Petitioner to pay attorneys' fees. This case does not present any valid reason why the Petition for Certiorari should be granted.

PRAYER

Respondents pray that the Petition for Certiorari be denied and that they have such other and further relief at law and at equity to which they be justly entitled.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 00-1783

IN
THE SUPREME COURT OF THE UNITED STATES

October Term 2000.

ERLING R. KROSBY
Petitioner

v.

HARRELL Z. BROWNING, THE CONTINENTAL INSURANCE COMPANY, KLEBERG & HEAD, SHELBY A. JORDAN, MATTHEW A. ROSENSTEIN.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals

PETITIONER'S REPLY BRIEF

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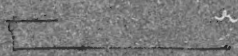
13 pp



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REPLY TO RESPONDENTS' COUNTERSTATEMENT OF THE CASE

Respondents state that they disagree with Petitioner's version of the facts. (Br. in Opp. 1). Respondents do not address which of the Petitioner's facts are perceived as misstatement of facts as required by this Court's Rule 15 and therefore, Respondents' statement is meant to cast a shadow of doubt on all the facts stated by Petitioner, which is actually a misrepresentation of facts.

Respondents cite several statements made by the District Court. However, such statements are false statement made by Respondents to the lower courts in order to obtain a summary judgment. . When such statements are repeated in Respondents' Brief in Opposition this is also misrepresentation to this Court, which is a very serious matter because this Court is the highest judicial authority of the United States.

As a consequence of such misrepresentation the District Court states incorrectly that Petitioner filed a lawsuit without first conducting a reasonable inquiry into facts, that Petitioner continued to pursue frivolous non-meritorious and vexatious course of conduct and the

allegations of Petitioner lacked evidentiary support. (Br. in Opp. 3.). Petitioner has been involved in this case since 1990 and has in his possession all the documents and pleadings that have been filed. Respondents' allegation that Petitioner does not know the facts in this case, is serious misrepresentation and a fraudulent attempt to support the allegation that Petitioner's lawsuit is frivolous.. The fallacy of the above mentioned incorrect statements is also proved by the fact that the courts below have prevented major discoveries to be performed in this case.

It is also a grossly distortion of facts when Respondent and the District Court state that Petitioner has stated that the bond is invalid. (Br. in Opp. 3) Petitioner has stated that Respondent Continental Insurance Company's allegation that it has subrogation rights against Respondent Browning is invalid because this is not stated in the trustee fidelity bond. It is also serious distortion of facts when Respondents through the District Court allege that Petitioner has stated that the bankruptcy court has jurisdiction and later changed that to a statement that the bankruptcy court has no jurisdiction. The truth of the

matter is that petitioner has stated that the bankruptcy court has jurisdiction of Respondent Continental pursuant the Bankruptcy Code 322 and Bankruptcy Rule 2010, but when the bankruptcy court did not reserve it jurisdiction in the Creditor Plan, the District Court has original jurisdiction and appellants have a right to a jury trial. (See Petition 28)

It is also a serious misrepresentation to this Court when Respondents confirm the District Court's statement that Petitioner made misrepresentation in his Pro Hac Vice Motion. In Petitioner's Motion (App 168 and 169) the only information that is given to obtain an approval of being admitted Pro Hac Vice is that Petitioner is admitted to the United States District Court for the Eastern District of Pennsylvania. Therefore, Respondents give false information to the District Court in order to have Petitioner's admission Pro Hac Vice revoked so he could not represent his client, Tor Husjord Shipping, in an appeal to the Fifth Circuit.

It is also misrepresentation of facts when Respondents confirm the District Court's opinion that

Petitioner misrepresented his client's location , status and health condition. Petitioner filed each time his client could not appear a motion for continuance stating the reasons given by his client for not being able to appear. It is abuse of discretion to revoke Petitioner's Pro Hac Vice for non-appearance of his client. Petitioner has also not misrepresented who the real party in interest is as alleged by Respondents. See App. 145-148. Petitioner's authority to represent his clients is stated in Tor Husjord's Affidavit (See App. 149-151).

As can be seen from the above statements and evidence the District Court's Summary Judgments and sanctions against Petitioner pursuant to Rule 11 of Fed. R. of Civ. Proc are based on misrepresentation of Respondents and should therefore be reversed.

However, the major basis for Petitioner's Petition for Writ of Certiorari is that the District Court's impartiality can reasonably be questioned because first of all the court's intention to prevent an appeal by revoking Petitioner's admission Pro Hac Vice as proved by the transcripts of the hearings. (App. 133-139), makes the

whole Summary Judgment of the District Court void. Petitioner respectfully argue that it would have a negative effect on the respect for the judiciary system if this Court does not decide that such conduct makes the Summary Judgment void.

RESPONDENTS' REASONS FOR DENYING THE WRIT.

(1). (i) Respondents' argument that Question No. 13 would cause the Supreme Court to become bogged down by complicating facts is not convincing because the facts are proved by the transcript of a hearing. (App. 133-139.).

(2) Question 17 is only a procedural question . The right for a person to appear Pro Se cannot be denied pursuant to the laws of the United States.

(3) Question No. 21 is only a procedural question. There is no rule of law that would deny a party from proving by affidavit that his attorney has the authority to represent him.

2. The allegation of Respondents that there is no conflict among the Circuits or the lower Courts is

incorrect . The question of immunity as a judge for bankruptcy trustees and the basis for liability of trustees, have been subject to different opinions of the Circuits. Further, what is an even more serious question is that the lower courts have made decisions contrary to several decisions of this Court. Most important is *Mosser v. Darrow*, 341 U.S. 267 (incorrect citation in Petition) which states that any act of a trustee which is contrary to the interest of the creditors makes the trustee subject to liability for damages. It would not make any sense to deny that selling real estate for almost 1/3 of their approved value without objective appraisal of an appraiser and without approval of the court and further, failure of maintaining the vessel in good conditions, are not conduct that is contrary to the interest of the creditors.

Another important decision of this Court that the District Court has ignored is *Celotex Corp. v. Carrett*, 477 U.S. 317 which states that no summary judgment can be entered unless major discoveries have been performed. The Bankruptcy Court and the District Court have not only entered a summary judgment without such major

discoveries, but, in addition, they denied discoveries of vital evidence in this case.

4. Respondents allege that Questions referred to in the Nos 1,2,3,4,5,6,7,8,9,10,11,12,14,15,16,7,18,19,20,22 & 23 are questions in which Petitioner does not have any standing. The reason for such argument is in line with Respondents' intention to prevent that major issues in this case be reviewed by this Court and that the Summary Judgments of the District Court be reversed. However, by requesting and obtaining a judgment against Petitioner based on the allegation that he has violated Rule 11 because he has filed a frivolous lawsuit, Respondents have opened up for the evaluation of all the issues of facts and law that are pertinent to the issue of a frivolous lawsuit, such as the Questions mentioned above.

5, The argument that the Petition should be denied because the Fifth Circuit dismissed the appeal on procedural grounds does not make sense. When the judge of the District Court lacks impartiality, its summary judgment is void and can be revoked any time even without an appeal.

RESPONDENTS' ARGUMENT IN OPPOSITION TO CERTIORARI.

I. As shown above, the finding of facts of the courts below is based on serious intentional misrepresentation of Respondents and must be set aside as clearly erroneous.

II RESPONDENTS' ALLEGATION THAT THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS AND THE LOWER COURTS..

Respondents argue that Petitioner fails to cite any contrary cases. or authorities regarding Rule 11. However, such cases apparently do not exist because nobody will allege that violation of Rule 11 has taken place when such allegations are based on fraudulent misrepresentations, and the sanctions are due to lack of impartiality of the courts below.

IV. RESPONDENTS' ALLEGATION THAT PETITIONER HAS NO STANDING.

Regarding this issue it is referred to Reasons for Denying the Writ. item 4. Further, Respondents commit a serious misrepresentation when they fail to inform this Court about the fact that the complainant regarding the pending disciplinary proceeding against

Petitioner in Pennsylvania is Respondent Browning, who unlawfully uses the Rules of Professional Conduct and disciplinary rules as a procedural weapon to prevent Tor Husjord from having a counsel who can file his petition for writ of certiorari. Such unlawful action should make him subject to disciplinary and procedural sanctions especially because this weapon has been used previously by Respondents by requesting the District Court to revoke Petitioner's admission Pro Hac Vice.

V. RESPONDENTS ARGUMENT THAT FIFTH CIRCUIT DISMISSED THE APPEAL ON PROCEDURAL GROUNDS WITHOUT REACHING THE MERITS.

The statement of Respondents that Fifth Circuit granted Respondents' Motion to Dismiss because of Petitioner's failure to timely file a statement of issues may not be true because the Fifth Circuit did not make any statement of fact and conclusion of law, and, the decision is obviously based on the wrong assumption that the appeal was from a judgment of a District Court exercising appellate jurisdiction in a bankruptcy case, see Rule 6(b) of Rules of Appellate Procedure, when it is a fact

that the District Court entered a summary judgment De Novo and therefore the requirement of Rule 6(b)(2) (B) that a statement of issue to be presented on appeal shall be served upon appellee, is not applicable, but only Rule 6(a). A statement of issues was served after the deadline even though not required. However, even if Rule 6(b) is applicable in this case, an appeal otherwise correctly filed should not be dismissed because of technicalities that do not cause prejudice to the other party.

This case raises the issue whether the lower courts attempt to establish that a trustee shall have full immunity as a judge. This Court should re-emphasize the proper rule of law stated in *Mosser v. Darrow* and thereby in the future reduce the risk of bankruptcy fraud.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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